Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court Of The United States

VOYAGER GUARANTY INSURANCE COMPANY and ALBERT BENJAMIN SPROUSE, JR.,

Petitioners,

- against -

JACKIE E. WHITSON and KATHY ANN ELLEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

A. Does a federal district court exceed its authority in remanding a case on grounds other than those found in 28 U.S.C. § 1447(c) where it is undisputed that removal is proper; that there is diversity of citizenship; that the amount in controversy exceeds $50,000.00 and that the court would also have jurisdiction of the cause of action under 28 U.S.C. § 1334?

B. Is the power of a federal district court to abstain from exercising jurisdiction of a cause of action under 28 U.S.C. § 1334(c) a substitute for the exercise of remand under 28 U.S.C. § 1447?

C. The basic question presented here is whether or not the United States District Court for the Northern District of Alabama had jurisdiction to hear the case of Jackie E. Whitson and Kathy Ann Ellen vs. Voyager Guaranty Insurance Company and Albert Benjamin Sprouse, Jr. (case number CV 94-AR-2679-E) once it was properly removed from the state court to the federal court.

Supplemental to this basic issue is the question of what are the grounds, if any, that give a party a right to seek review of an order of remand of a case removed to federal court by authority of (1) 28 U.S.C. § 1332, and (2) 28 U.S.C. § 1452.

D. Where removal is proper under both 28 U.S.C. § 1332 and 28 U.S.C. § 1452, may a federal district court abstain and remand the case for the stated purpose to "put on the jurisdictional brakes" on the "power and right of the bankruptcy courts to do full justice on a wide front."

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Eleventh Circuit are the Petitioners/Defendants Voyager Guaranty Insurance Company[1] and Albert Benjamin Sprouse, Jr. and Respondents/Plaintiffs Jackie E. Whitson and Kathy Ann Ellen as well as:

Honorable William M. Acker, Jr., Judge, United States District Court for the Northern District of Alabama

Voyager Group, Inc. — Defendant.

Voyager Insurance Companies — Defendant.

Voyager Life & Health Insurance Company — Defendant.

Voyager Life Insurance Company — Defendant.

Voyager Property & Casualty Insurance Company — Defendant.

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[1]In accordance with Rule 29.1, Voyager Guaranty Insurance Company is now Triton Insurance Company by name change. It is a subsidiary of Commercial Credit Company. Other subsidiaries of Commercial Credit Company are Commercial Credit Insurance Services, American Health & Life Insurance Company and World Service Life Insurance Company. Commercial Credit Company is a subsidiary of CCC Holdings, Inc. which in turn is a subsidiary of The Travelers, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners respectfully pray that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Eleventh Circuit entered on May 11, 1995 which denied the Petition For Writ Of Mandamus. (This Order is attached under Appendix A.)

BASIS FOR JURISDICTION

The order of the United States Court of Appeals for the Eleventh Circuit was entered on May 11, 1995, case number 95-6155 denying a Petition For Writ Of Mandamus directed to the Honorable William M. Acker, Jr., United States District Judge for the Northern District of Alabama. This Court has jurisdiction to review the order of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

28 U.C.S. § 1441. Actions removable generally

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
>
> . . .
>
> (e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

28 U.C.S. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between -

(1) Citizens of different States;

. . .

(c) For the purposes of this section and section 1441 of this title -

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, . . .

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11, or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

. . .

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C. § 1447. Procedure after removal generally

. . .

(c) . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . .

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, . . .

Alabama Code § 6-5-440 (1975). Simultaneous actions for same cause against same party prohibited

No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case, the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times.

STATEMENT OF THE CASE

It is necessary that the statement of the case include a discussion of two state court cases and one bankruptcy case for an understanding of the issues that give rise to this Petition.

The lawsuit which is the basis of this Petition for Writ of Certiorari was originally filed in the Circuit Court of Marengo County, Alabama on June 8, 1994. The case is identified as Civil Action No. CV 94-069 naming Kathy Ann Ellen and Jackie E. Whitson as Plaintiffs representing a class, and Petitioners Voyager Guaranty Insurance Company and Albert Benjamin Sprouse, Jr. and others as Defendants. (The Complaint is attached under Appendix

F and is hereafter referred to as "the Marengo County case.")

While the Plaintiffs filed no motion for class certification, a class was certified nineteen (19) days after service of a summons and complaint and before the Petitioners or any other Defendant had entered an appearance. The ex parte order certifying this case as a class action was entered "after due deliberation and consideration of the totality of the circumstances and the record and for good cause shown . . . ". This ex parte order was prepared and submitted to the court by the attorneys for the Plaintiffs. (This Class Certification Order is attached under Appendix G.)

Prior to filing the Marengo County case, the Plaintiff Jackie E. Whitson filed a Complaint in the Circuit Court of Talladega County, designated as Civil Action No. CV 94-177. This Complaint was filed on April 23, 1994 naming Farmers Furniture of Alabama, Inc.; Richard McQueen; and **Albert Benjamin Sprouse, Jr.** as Defendants. The Talladega County Complaint was later amended. (This Amended Complaint is attached under Appendix H and is hereafter referred to as "the Talladega County case.") The Talladega County case has been certified as a class action with Plaintiff Jackie E. Whitson and others designated as class representatives. (This Class Certification Order is attached under Appendix I.) The operative facts on which both the Talladega County case and the Marengo County case are based are the same. The complaints are the same. **Albert Benjamin Sprouse, Jr.** is a Defendant in both actions.

The prior pending action in Talladega County naming Jackie E. Whitson as Plaintiff seeks the same relief against Defendant Sprouse as in the instant Marengo County case. The pendency of this prior Talladega County case operates as a stay of the Marengo County case under Alabama Code § 6-5-440 (1975).

Prior to filing the Marengo County case, Plaintiff Kathy Ann Ellen, a resident of the Northern District of Alabama, filed a Chapter 13 bankruptcy petition with the Bankruptcy Court for the Northern District of Alabama. On September 27, 1994, the bankruptcy petition was amended to include as assets of the debtor an action against Heileg-Myers Furniture Company and an action against Voyager Insurance Company. (This Amendment is attached under Appendix J.)

On July 12, 1994, the Petitioners and other Defendants removed the Marengo County case to the United States District Court for the Southern District of Alabama. The basis for the Notice of Removal was two-fold: fraudulent joinder of the resident Defendant Sprouse and the pending bankruptcy petition filed by the Plaintiff Kathy Ann Ellen. The Notice of Removal incorporates 28 U.S.C. § 1441, § 1332 and § 1452. (The Notice of Removal, the Memorandum in Support of Removal, and the Amendments thereto are attached under Appendix K.)

The Petitioners and other Defendants filed a Motion to Transfer Venue to the Northern District of Alabama, which is the district of the parties' residence, the district in which the alleged actions took place, and the district where Plaintiff Ellen's bankruptcy case is pending. (This Motion to Transfer is attached under Appendix L.)

On October 31, 1994, U.S. District Judge Hand entered an Order transferring venue to the Northern District of Alabama. (This Order is attached under Appendix D.) On Page 1 of that Order is the finding:

> "The Court is simply not satisfied that, having presented a claim for punitive damages and having obtained an ex parte certification of its proposed class by the state court, plaintiffs' contention regarding jurisdictional amount is presented in good faith."

A footnote on Page 2 of the Order states:

> [1] Defendants surmised at oral arguments on September 29, 1994, that plaintiffs' choice of Marengo County, Alabama, was associated with plaintiffs' ability to obtain ex parte class action certification within 19 days of filing the complaint. Plaintiffs' counsel responded only that he has scattered similar class actions around the State of Alabama so as not to place a burden on rural courts. The Court is not impressed with plaintiffs' explanation.

On November 9, 1994, the District Court for the Northern District of Alabama held an introductory conference. At that conference, the Plaintiffs' attorney advised the district court that the damages of the named Plaintiffs would exceed $50,000.00 each exclusive of interest and costs if this were an individual action. The district court noted that this admission did not satisfy the requirement of diversity by reason of fraudulent joinder.

On January 11, 1995, without further hearing or scheduling, the district court entered an Order of Abstention and Remand to the Marengo County state court. (This Order is attached under Appendix B.)

The Order of Abstention and Remand was accompanied by a Memorandum Opinion that is incorporated under Appendix B. In the Memorandum, the district court concluded that in order to put the jurisdictional brakes on the power of the bankruptcy courts:

> **This court will abstain and will remand insofar as the motion to remand is based in § 1452(c).[2] Equity and comity require this court to exercise its right of discretionary abstention in the**

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[2] There is no code section entitled § 1452(c).

present removal context and to remand the case to the Alabama court in Marengo County.[3]

The Petitioners filed a Motion to Reconsider the Order of Abstention and Remand. (This Motion and the Memorandum are attached under Appendix M.) The district court entered an Order which denied the Motion to Reconsider but advised the Marengo County court to strike Jackie E. Whitson as a Party-Plaintiff and render moot the question of whether or not Sprouse was a bona fide non-diverse Defendant. (This Order and Memorandum Opinion are attached under Appendix C.)

The Petitioners filed a Petition For Writ of Mandamus in the United States Court of Appeals for the Eleventh Circuit. On May 11, 1995, the Eleventh Circuit denied that Petition without an accompanying Memorandum Opinion. (This Order is attached under Appendix A.) This denial is tantamount to a determination that the Petitioners were not entitled to appellate review of the district court's order of abstention and remand.

INTRODUCTION

Basic to the Petitioners' arguments for granting the Writ of Certiorari are these undisputed facts:

1. The case was timely and properly removed to the United States District Court from the Alabama state court in Marengo County; and

2. There is diversity of citizenship that is not defeated by the fraudulent joinder of the Alabama resident Sprouse as a Defendant; and

---

[3]"Comity" (i.e. judicial comity) is defined in Black's Law Dictionary as: "The principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."

3. The amount in controversy exceeds $50,000.00; and

4. The Plaintiff Ellen had a Chapter 13 bankruptcy petition pending in the Bankruptcy Court for the Northern District of Alabama at the time the Marengo County case was filed and removed; and

5. The federal district court refused to consider diversity of citizenship/amount in controversy as a ground for jurisdiction, but elected instead to apply the brakes on jurisdiction under 28 U.S.C. § 1452 as the basis of its order to abstain and remand.

It is on these facts that Petitioners seek their right to have their case heard within the federal system. To deny them this right is to deny them the right afforded under Amendment V of the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

I. The Order Of Abstention And Remand Is Reviewable — There Is No Determination That The Federal Court Lacked Subject Matter Jurisdiction.

The action of the Eleventh Circuit Court of Appeals in denying Petitioners review of the district court's order of abstention and remand is directly contra to this Court's decision in *Thermtron Products, Inc. vs. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L. Ed. 2d 542 (1976). In *Thermtron* the issue was whether the legislative language in 28 U.S.C. § 1447(d) prevented review of a remand order in a case properly removed to federal court but remanded on grounds not authorized by § 1447(c). Section 1447 provides in part:

> (c) . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . .
>
> (d) An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, . . .

In responding to the issue of reviewability in *Thermtron* this Court held:

> This means that only remand orders issued under § 1447(c) and invoking the grounds specified therein — that removal was improvident and without jurisdiction — are immune from review under § 1447(d). 96 S. Ct. at 590.
>
> There is no indication whatsoever that Congress intended to extend the prohibition against review to reach remand orders entered on grounds not provided by the statute. 96 S. Ct. at 592.

In *Thermtron*, this Court reviewed the remand order because it was based on grounds other than those contained in § 1447(c). The same is true here. The district judge in *Thermtron* remanded the case to state court because he had a crowded court docket, (i.e.) the remand order was based on a heavy caseload. Here, the remand order is based on a concern as to the over-reaching of bankruptcy jurisdiction, i.e. " . . . there must be a point at which to put on the jurisdiction brakes". In this case, the remand order provides:

> This court will abstain and will remand insofar as the Motion to Remand is based on §1452(c). Equity and comity require this court to exercise its right of discretionary abstention in the present removal context and to remand the case . . .

In neither case was the remand order based upon any finding that the federal court lacked subject matter jurisdiction or that the case was removed "improvidently and without jurisdiction".

An additional factor present in this case is the existence of diversity jurisdiction by reason of a fraudulent joinder of a non-diverse Defendant. This aspect of the

case was ignored in reaching a determination to abstain and remand.

Drawing on an opinion in *Carnegie-Mellon v. Cohill*, 484 U.S. 343, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988), the Seventh Circuit Court of Appeals in *J.O. and P.O. v. Alton Community Unit School District*, 909 F.2d 267 (7th Cir. 1990), opined:

> federal appellate courts have the power to review orders remanding a case on grounds other than those listed in subsection 1447(c). Read together, the holdings in *Carnegie-Mellon* and *Thermtron Products* authorize appellate jurisdiction over a district court's remand of pendent state claims. The most notable support for such an interpretation would be *Carnegie-Mellon* itself, where the Supreme Court heard an appeal from an appeal of a district court's remand of pendent state claims. In *Carnegie-Mellon* the court decided the district court's power to order the remand but never suggested that it and the lower appellate court lacked the power to hear an appeal from the district court's order. 909 F.2d at 270.

In the case of *In re Surinam Airways Holding Company*, 974 F.2d 1255 (11th Cir. 1992) the Eleventh Circuit Court of Appeals recognized and followed the narrow exception set forth in *Thermtron* and *Carnegie-Mellon*. In *Surinam*, the Eleventh Circuit held:

> . . . A remand order pursuant to 28 U.S.C. § 1367(c) is not premised on § 1447(c) because it is a discretionary decision declining the exercise of *expressly acknowledged jurisdiction*. It is not a remand premised on either a defect in removal procedure or a lack of jurisdiction. As a result, an order expressly remanding pursuant to § 1367(c) is reviewable. *See Thermtron*, 423

> U.S. at 346, 351-52, 96 S.Ct. at 590, 593; *cf. Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 108 S.Ct. 614, 98 L. Ed.2d 720 (1988) . . . . *Surinam*, 974 F.2d at 1257.

In the Order of Abstention and Remand and in the Memorandum Opinion, the district court openly states that it is remanding on non-1447(c) grounds. The district court does not reach a finding that the federal court lacked jurisdiction nor that there was a defect in the removal procedure.

Based on the case law and interpretation of § 1447(c) and (d), the remand order of the district court is subject to appellate review.

II. This Case Presents An Important Question On The Legal Right Of Access And Adjudication Of Claims In Federal Court.

A. Fraudulent Joinder.

By the ruling set out in the Memorandum Opinions of January 11, 1995 and February 3, 1995, the district court completely ignores the Petitioners' rights to seek adjudication in the federal court under 28 U.S.C. § 1332 (diversity of citizenship and amount in controversy). As a result, the Petitioners have been subjected to the very prejudice which Congress sought to avoid. That prejudice is proven and evidenced by the ex parte class certification order, prepared by the Plaintiffs' attorneys and entered by the Marengo County Court **prior to the Petitioners or any Defendant appearing in the case.**

Noting that the Plaintiffs based their Motion to Remand on the grounds that there was not a complete diversity, the district court concluded that it could not decide this issue because to do so would in effect grant a motion to dismiss by the non-diverse Petitioner/Defendant Sprouse. That is:

> To find Sprouse to have been fraudulently joined by plaintiffs for the sole purpose of destroying diversity, and to deny Plaintiffs ab initio the opportunity to pursue Sprouse is the only avenue by which this court could find the complete diversity necessary for removal under § 1332. (Appendix B Memorandum Opinion, Page 3)

In its February 3, 1995 Memorandum Opinion the district court goes further with the concept that remand was not based upon the lack of diversity when it determined that the Petitioners' argument on fraudulent joinder was never supported by materials offered at the January 26, 1995 hearing. (Appendix C Memorandum Opinion, Page 3)

It is hard to rationalize this statement with the record that was before the Court. This issue was a matter for the district court's concern if it was to reach a determination that the federal court lacked subject matter jurisdiction or that the case was removed improvidently and without jurisdiction. Since the fraudulent joinder was admittedly not considered by the district court, this determination was not made. It was not that the issue was not before the district court, it was just an issue that was not considered.

Paragraphs 16 and 18 of the Notice of Removal (Appendix K) initiate the original claim of fraudulent joinder by reason of a pending prior identical lawsuit.

> 16. On April 23, 1994, Plaintiff Jackie E. Whitson sued Defendant Sprouse in a state court action styled *Jackie E. Whitson v. Farmers Furniture of Alabama, Inc.; Richard McQueen; and Albert Benjamin Sprouse, Jr., et al.* presently pending in the Circuit Court of Talladega County, Alabama as Case No. CV 94-177. A copy of that complaint and responsive pleadings are attached in Ex-

> hibit "D". This complaint reflects the same cause of action and claims against the Defendant Sprouse as are alleged in the instant case. Two of the attorneys representing Whitson in this action represented Whitson in the Talladega County action.
>
> Any alleged claim by Plaintiff Whitson against Defendant Sprouse is already being litigated in this prior lawsuit pending in Talladega County. The only benefit of naming Sprouse again as a Defendant in this lawsuit is to defeat diversity jurisdiction.
>
> 18. In the absence of an allegation of a valid cause of action against Defendant Sprouse, he is fraudulently joined as a Defendant and is due to be ignored for diversity jurisdictional purposes. *Mask v. Chrysler Corp.*, 825 F. Supp. 285 (N.D. Ala. 1993); *Covington v. Indemnity Ins. Co. of North America*, 251 F.2d 930 (5th Cir. 1958) cert. denied, 357 U.S. 921.

Paragraph 3 of Plaintiffs' Motion To Remand under Appendix N reads:

> 3. Jackie Whitson's claim should not be abated in this action because the issues and parties in this claim are not identical to the issues and parties in the claim filed in Talladega County.

Paragraph 3 on Page 10 of the Plaintiffs' Supplemental Brief under Appendix O reads in part:

> With regard to Jackie Whitson's claims against Sprouse, all matters raised in the complaint in the present case were raised in the Talladega County complaint, except the co-conspirators with Sprouse are different in the two com-

> plaints. This is consistent with the idea of retailers involved in these matters are different from the insurers. Sprouse was not only an employee of Farmers Furniture, he was also a licensed agent for Voyager. As such it was possible, and in fact was the case, that he participated in a conspiracy with Farmers Furniture and also in a conspiracy with Voyager. These two conspiracies would be separate events for which he would be separately liable. The elements required to prove a conspiracy in Alabama are discussed under a later issue herein.

Paragraph No. 3 of the August 22, 1994 Order of the District Court for the Southern District under Appendix E reads:

> 3. Plaintiffs' basis for contending that the claims asserted against Sprouse in this action are not identical to those asserted against Sprouse in *Whitson v. Farmers Furniture of Alabama, Inc.*, Civil Action No. CV 94-177 (Circuit Court of Talladega County) inasmuch as the latter action clearly alleges misrepresentation and suppression with respect to the purchase of "non-filing insurance for the purpose of perfecting a security interest in furniture and jewelry [purchased by the plaintiff]." Talladega Complaint at § 7.

And finally, Item 5 on Page 3 of the Order transferring this case to the Northern District of Alabama under Appendix D reads:

> (5) Plaintiff Whitson filed a lawsuit against Defendant Sprouse in the Circuit Court of Talladega County, Alabama, which alleges the commissions of wrongs identical to the case at bar with the sole exception of the conspiracy claim; . . .

It is clear from the issues raised by the pleadings and submitted to the district court that this removal petition was predicated not just on the jurisdiction afforded by Plaintiff Kathy Ann Ellen's pending bankruptcy case, but also on the jurisdiction arising out of diversity of citizenship that could not be defeated by reason of the fraudulent joinder.

Evidenced by the Memorandum Opinions, the district court ignored the two-fold test for determining whether a joinder is fraudulent:

> (1) look to see whether there is no possibility the plaintiff can establish any cause of action against the resident defendant; and (2) look to see whether plaintiff has fraudulently pled jurisdictional facts in order to bring the resident defendant into state court. *Cabalceta v. Standard Fruit Company*, 883 F.2d 1553, 1561 (11th Cir. 1989); *Insigna v. LaBella*, 845 F.2d 249, 254 (11th Cir. 1988); *Mask v. Chrysler Corporation*, 825 F. Supp. 285, 288 (N.D. Ala. 1993).

Never has a case fit so squarely within this two-fold test. The facts concerning the fraudulent joinder of Petitioner Sprouse are not in dispute. Those undisputed facts and that the remand order is not issued pursuant to 28 U.S.C. § 1447(c), make the case ripe for review by this Court. The district court dismissed the issue of the diversity of citizenship with these words:

> This court is unprepared to make such an early and final ruling on a serious question of Alabama law. To do so would be presumptuous. (Appendix B, Memorandum Opinion, Page 3)

That the district court did not do so subjects the remand order to review as provided in *Thermtron*, and presents an important question on the legal right of access and adjudication of claims in federal court.

B. Removal Of Claims Related To Bankruptcy Cases — 28 U.S.C. § 1452.

As is evidenced by the Memorandum Opinion accompanying the district court's Order of Abstention and Remand, there is confusion as to jurisdiction conferred by a removal under 28 U.S.C. § 1452. With bankruptcy taking an ever increasing role in the litigation process, both the bench and bar need guidance in this area.

While this is an unusual case in that dual grounds for removal exist, i.e. that based on diversity jurisdiction (28 U.S.C. § 1441 and § 1332) and that based on bankruptcy jurisdiction (28 U.S.C. § 1452), it does present an opportunity to define the parameters of the jurisdiction conferred by 28 U.S.C. § 1452.

The confusion is not only apparent from the district court's opinion, it was a matter of concern when the case was originally removed because of the different venue requirements.

If removed under § 1441 and § 1332, it was to be removed to the district court where the case was pending, i.e. the Southern District of Alabama. If removed under § 1452, it was to be removed to the district court where the bankruptcy was pending, i.e. the Northern District of Alabama.

To overcome this conflict, the Petitioners elected to remove under § 1441 and § 1332 to the Southern District, then file an Amendment To Removal adding § 1452 and then file a Motion to Transfer Venue to the Northern District.

Now we are faced with the question as to whether abstention and remand under the authority of 28 U.S.C. § 1334(c) satisfies or replaces the requirement that the district court find the case was removed improvidently and without justification. The Petitioners maintain that it does not. There is a difference between finding that the

case was removed improvidently and without justification and abstaining from hearing the case in the interest of justice; or in the interest of comity; or out of respect for state law. *See, e.g., Surinam*, 974 F.2d at 1257 (remand order pursuant to 28 U.S.C. § 1367(c) is not premised on § 1447(c), it is only a discretionary decision declining the exercise of expressly acknowledged jurisdiction).

As the Ninth Circuit concluded in *In re Tucson Estates, Inc.*, 912 F.2d 1162, 1167 (9th Cir. 1990) (cited in the district court Memorandum Opinion of January 11, 1995, Appendix B) one of the factors to consider when deciding to abstain is:

> (5) The jurisdictional basis, if any, other than 28 U.S.C. § 1334.

Since this factor was not considered by the district court, a determination to abstain based on comity does not replace the necessity of a finding that the case was removed improvidently and without jurisdiction.

III. The Court Of Appeals Erred In Denying The Petition For Writ Of Mandamus Resulting In A Conflict Between The Circuits.

The Eleventh Circuit denying the Petition For Writ Of Mandamus without opinion is tantamount to a holding that the district court's order of abstention and remand is not subject to appellate review. This produces a conflict between the panels of the Eleventh Circuit and between the Circuits. In *J.O. and P.O. v. Alton Community Unit School District*, 909 F.2d at 270, the Seventh Circuit Court of Appeals applied the principles of *Carnegie-Mellon* and *Thermtron Products* in reviewing a remand order. The Eleventh Circuit did the same in *Surinam*, 974 F.2d at 1255. Here another Eleventh Circuit panel, without any

basis for its reasoning, erroneously chose otherwise. In doing so, the Eleventh Circuit created a conflict among its own panels and among the Circuits which this Court must now correct.

The practical effect of the Eleventh Circuit Court of Appeals in denying Petitioners' petition for a writ of mandamus to correct the district court's action of abstention and remand is a conflict with this Court's decision in *Thermtron Products.*

CONCLUSION

The failure of the district court and the Eleventh Circuit to consider and find the mandatory elements under 28 U.S.C. § 1447(c) to support the remand order, coupled with the violation of the due process rights of the Petitioners, require that the remand order be reversed and the case returned to federal court. The Petition For Writ Of Certiorari is due to be granted.

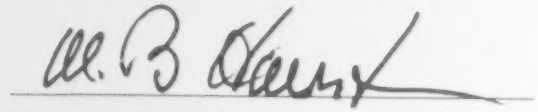
For the reasons stated herein, this Court should review this case in order to:

(1) resolve the conflict within the Eleventh Circuit Court of Appeals regarding this Court's decision in *Thermtron Products*; and

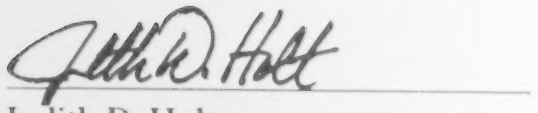
(2) address the statutory distinction between equitable and jurisdictional remands; and

(3) determine if abstention to hear a case is a substitute for an order of remand; and

(4) determine the responsibility of a district court to hear a matter properly removed under the authority of 28 U.S.C. § 1452(a).



William B. Hairston, Jr.



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing petition on the following by placing a copy in the United States Mail, properly addressed, and first class postage prepaid on this 4th day of August, 1995.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-6155

IN RE:

VOYAGER INSURANCE COMPANY,
ALBERT BENJAMIN SPROUSE, JR.,

Petitioners,

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Alabama

BEFORE: ANDERSON, EDMONDSON and COX, Circuit Judges.

BY THE COURT:

Petitioners' petition for writ of mandamus is denied.

Petitioners' motion to stay the underlying state court proceedings pending resolution of their petition is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

KATHY ANN ELLEN, ET AL.,	)	
	)	
Plaintiffs	)	CIVIL ACTION NO.
	)	
VS.	)	94-AR-2679-E
	)	
VOYAGER INSURANCE CO., ET AL.,	)	
	)	
Defendants	)	
	)	

ORDER OF ABSTENTION AND REMAND

In accordance with the accompanying memorandum opinion, this court finds that the motion to remand filed by plaintiffs is well taken and is hereby GRANTED in an exercise of the obligation to abstain and to defer to the state forum. It is therefore ORDERED, ADJUDGED and DECREED that this case be and it is hereby REMANDED to the Circuit Court of Marengo County, Alabama, from whence it was removed. The Clerk is directed to send a certified copy of this order to the Clerk of the Circuit Court of Marengo County, Alabama, together with a copy of all pleadings and orders filed after the removal.

The parties shall bear their own respective costs.

DONE this 11th day of January, 1995.

/s/ WILLIAM M. ACKER, JR.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

KATHY ANN ELLEN, ET AL.,	)	
	)	
Plaintiffs	)	CIVIL ACTION NO.
	)	
VS.	)	94-AR-2679-E
	)	
VOYAGER INSURANCE CO., ET AL.,	)	
	)	
Defendants	)	
	)	

MEMORANDUM OPINION

I. PROCEDURAL HISTORY

This action was originally filed in the Circuit Court of Marengo County. It was removed to United States District Court for the Southern District of Alabama by defendants pursuant to 28 U.S.C. §§ 1441, 1332, 1452 and 1334, claiming that the parties are diverse and, in the alternative, that the cause arises or is related to a bankruptcy case. The case was then transferred by the Southern District, pursuant to 28 U.S.C. § 1404(a), to this court, which is the district where plaintiff, Kathy Ann Ellen ("Ellen"), has a pending Chapter 13 bankruptcy proceeding and where the alleged wrongs took place. The case is now before the court on plaintiffs' motion to remand, upon which the Southern District expressly declined to rule.

On June 8, 1994, Ellen and Jackie E. Whitson (jointly "plaintiffs"), on behalf of themselves and all others similarly situated, filed their original state court complaint against Voyager Insurance Companies, Voyager Guaranty

Insurance Company, Voyager Life Insurance Company, Voyager Group, Inc., Voyager Property and Casualty Insurance Company, and Albert Benjamin Sprouse (collectively "defendants"). The complaint alleges that defendants were guilty of misrepresentations and fraud regarding things called non-filing insurance and credit property insurance, and that defendants conspired to deprive plaintiffs and members of the putative class of monies assessed as "premiums" for these unnecessary, so-called insurance policies.

Two months before filing as a named plaintiff in Marengo County, Ellen filed a petition pursuant to Chapter 13 of the Bankruptcy Code in the Bankruptcy Court for the Northern District of Alabama, sometimes called the "Debtors' Court." Whether she obtained the Bankruptcy Court's permission to join as a plaintiff, or whether she amended her bankruptcy petition after this suit was filed to add her claim against these defendants as an asset of her bankruptcy estate, are questions unanswered from the record.

II.PERTINENT FACTS

Plaintiffs, who are Alabama residents, for themselves and seeking to represent a class composed of other individuals who purchased policies of so-called credit property insurance and/or policies of so-called non-filing insurance issued and/or serviced by defendants, allege that defendants made certain misrepresentations by which they fraudulently obtained monies representing "premiums."

Defendant Sprouse is an Alabama resident and is an employee of Farmers Furniture in Talladega. He also was a licensed insurance agent for one or more of the Voyager defendants. Voyager, in each and all of its various corporate manifestations, is not a resident of Alabama.

III. Discussion

Plaintiffs base their motion to remand on their denial of the existence of complete diversity (including their contention that the individual claims cannot be aggregated to exceed the $50,000 jurisdictional amount), and on the doctrine of abstention as to a bankruptcy removal. This opinion focuses on whether or not to exercise this court's jurisdiction over a wide-ranging controversy only slightly related to a bankruptcy proceeding.

The reason this court is unwilling to remand for lack of diversity is that to do so would constitute, in effect, the granting of a motion to dismiss by the only non-diverse defendant, Sprouse. To find Sprouse to have been fraudulently joined by plaintiffs for the sole purpose of destroying diversity, and to deny plaintiffs *ab initio* the opportunity to pursue Sprouse, is the only avenue by which this court could find the complete diversity necessary for a removal under § 1332. This court is unprepared to make such an early and final ruling on a serious question of Alabama law. To do so would be presumptuous.

Pursuant to 28 U.S.C. § 1452(a), any claim or cause of action can be removed if the district court has original jurisdiction based on § 1334. Section 1452(a) provides in pertinent part:

> (a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, *if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.*

28 U.S.C. § 1452(a) (emphasis supplied). The reference in § 1452(a) to § 1334 requires a reading of § 1334, which provides in pertinent part:

> (b) [T]he district courts shall have original *but not exclusive* jurisdiction of all civil proceedings arising under title 11, or *arising in* or *related to cases under title 11.*

28 U.S.C. § 1334(b) (emphasis supplied).

Many courts have undertaken to define the vague phrases "arising in" and "related to." Because of this vagueness (not vague enough to raise a "due process" question), bankruptcy removal jurisdiction can sometimes be difficult. This court will not discuss "arising in" because to do so is unnecessary. Several circuits have adopted the Third Circuit's test for determining "related to" jurisdiction. The Third Circuit gave its interpretation in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984): "[W]hether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." The Eleventh Circuit has adopted this very broad definition of "related to." *See Matter of Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990). In the instant removal, it is clear to this court that the removed claims are "related to" the Title 11 (Chapter 13) proceeding pending in the Bankruptcy Court, inasmuch as any monetary relief obtained in the instant case by Ellen automatically becomes property of her bankruptcy estate. Other courts have found a sufficient nexus between Chapter 13 cases and state law claims upon which to establish district court jurisdiction over the entire state court case, even though other parties are involved. *See Medina-Figueroa v. Heylinger*, 63 B.R. 572 (Bankr. D.P.R. 1986) (court had jurisdiction over Chapter 13 debtor's malpractice claim where damages were property of the bankruptcy estate); *In re Fleet*, 53 B.R. 833 (Bankr. E.D. Pa. 1985) (class action brought by debtor was determined to be property of the estate). With all due respect to the courts who are expansive in their reach and believe strongly in the power and right of bankruptcy

courts to do full justice on a wide front, there must be a point at which to put on the jurisdictional brakes. That point is reached in this case.

Plaintiffs have asked this court to abstain from exercising its bankruptcy jurisdiction, and have invoked both the discretionary and mandatory abstention provisions of 28 U.S.C. § 1334, which say:

> (c)(1) Nothing in this section prevents a district court *in the interest or justice, or in the interest of comity with State courts or respect for State law,* from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court *shall abstain from hearing such proceeding* if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334 (emphasis supplied).

There is an ongoing debate as to whether the abstention provisions in § 1334 apply to removed cases, such as the present one. *See Thomasson v. AmSouth Bank, N.A.*, 59 B.R. 997. 1002 (N.D. Ala. 1986). *See also O'Rourke v. Cairns*, 129 B.R. 87, 89 (E.D. La. 1991) ("how can abstention apply after a case has been removed if, conceptually, a state court claim is no longer pending that can go forward while the federal court stays or suspends its jurisdiction?"). It can readily be seen that some bankruptcy courts refuse to abstain in removed cases by voiding the strange belief that the abstention provisions are inappo-

site in removed cases. *See In re Branded Products, Inc.*, 154 B.R. 936 (W.D. Tex. 1993). In *Branded Products*, the court discussed the legislative history of § 1334(c)(2) and found a significant difference between the principles governing abstention and those governing remand:

> Invoking abstention in the context of a removed case would result (in the usual case) in eliminating the lawsuit. Remand, on the other hand, preserves the lawsuit, without disturbing original filing dates or such service of process as may have been accomplished before the suit was removed to federal court. Again, removal and remand contemplate one action, the question presented being which tribunal handles it. Abstention, on the other hand, contemplates two actions, . . . the question presented being which action will take precedence and go forward first (or in lieu of the other).

Id. at 940 (footnote omitted). *See also In re 666 Associates*, 57 B.R. 8 (Bankr. S.D.N.Y. 1985); *In re Ross*, 64 B.R. 829, 834-35 (Bankr. S.D.N.Y. 1986); *Matter of Micro Mart, Inc.*, 72 B.R. 63, 64 (Bankr. N.D. Ga. 1987); *In re Fairchild Aircraft Corp.*, No. 90-50257C, 1990 WL 119650 (Bankr. W.D. Tex. June 18, 1990). This court finds that the refusal even to consider abstention in a case removed because "related to" a bankruptcy matter constitutes a complete misreading of legislative intent, and is highly offensive to the concept of federalism.

The argument that there is no parallel state court action currently pending in Marengo County so that abstention by this court will effectively eliminate a forum for adjudicating this controversy is, it seems to this court, ludicrous. Because the pending state court action was removed to federal court, *remand is the means for effectuating abstention*, that is, if abstention is called for. Under the bankruptcy removal statute, the court to which a bank-

ruptcy claim or cause of action is removed may remand for equitable reasons alone:

> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1452(b). Some of the factors courts have considered in making equitable remand decisions include: (1) *forum non conveniens;* (2) a finding that, if the civil action has been bifurcated by removal, the entire action should be tried in one court, something the bankruptcy court is ill-equipped to do; (3) a state court is better able to respond to questions of state law; (4) the expertise of a particular court is superior; (5) there may be a duplicative or wasteful use of judicial resources; (6) prejudice may be caused to the involuntarily removed parties; (7) comity considerations should dominate; and (8) a diminished likelihood of consistent results if a federal court presumes to adjudicate state causes of action (a fact which may necessitate certification of a question of state law to the state's highest appellate tribunal, causing more delay). *See Browning v. Navarro,* 743 F.2d 1069, 1076 n. 21 (5th Cir. 1984).

In addition, many courts, in exercising equitable abstention, have taken into account the requisites for mandatory or discriminatory abstention under § 1334(c). *See Thomasson,* 59 B.R. at 1002. These include (1) while the basic claim is based on *state* law, it is only "*related to*" the bankruptcy case under Title 11; (2) the claim could not

have originally been brought in federal court absent the court's bankruptcy jurisdiction; and (3) a timely resolution of the claim can occur in state court. While the removing parties here argue with some merit that Marengo County is not the most convenient or appropriate forum (an idea with which the Southern District tended to agree), and even hint that they may receive "home cooking" there, this court is confident that the Circuit Court of Marengo County is entirely capable of dealing with a motion to transfer this case to a more appropriate state forum, if there is one, and, if not, to give the parties a fair trial, subject, of course, to appellate review by the Supreme Court of Alabama. A timely resolution of the issues presented can occur either in Marengo County or in the circuit court in the Alabama county to which it may be transferred.

The mere fact of Ellen's pending "Debtors' Court" proceeding should, in all fairness, not form the basis for federal preemption of the entire controversy, especially when the first issue to be decided under Rule 23(a)(4), F.R.Civ.P., or the identical Alabama procedural rule, will be to determine whether a named plaintiff who is in Debtors' Court can be considered an adequate and fair representative for a much larger class of persons who are not bankrupt. A class representative whose right to negotiate a settlement is severely compromised by her obligations to her creditors and to the bankruptcy court, as well as to the class members, may well prove to be a person who is not in a position to serve as a Rule 23 class representative.

If this court's only viable option were equitable remand under § 1452(b), an application of equitable considerations to the facts of the present case would lead this court to the conclusions that the instant case involves solely issues of state law, and that it is not clear that a state court is less qualified to address the Alabama issues

than is this court, especially when the questions of state law may be somewhat unsettled. Furthermore, if the case is not remanded, it should automatically go to the bankruptcy court by this court's order of general reference and probably trigger a motion for withdrawal because of the jury demand. *See In re Republic Oil Corp.*, 51 B.R. 355 (Bankr. W.D. Wis. 1985). Plaintiffs end by persuasively arguing that this court should divest itself of jurisdiction where there is no basis for federal jurisdiction other than the relatedness of the claim to Ellen's bankruptcy proceedings, citing *In re Sweeney*, 49 B.R. 1008 (Bankr. N.D. Ill. 1985). The state claim in *Sweeney* involved a novel question of state law. *Id.* at 1010-11. In the instant case, the trial court may be required to decide, *inter alia*, what is Alabama's definition of what constitutes an insurance contract. This court studied the law of contracts in law school, but so did every state court judge in Alabama.

As stated also, it is not evident that this case would proceed to a resolution in the state court any less expeditiously than in this court, but, also as previously said, the primary basis for remanding here is the overriding principle of comity, a not unimportant consideration and one that should never be cavalierly overlooked by a federal court of limited jurisdiction.

IV. CONCLUSION

To summarize, under 28 U.S.C. § 1334(c)(1), a district court can abstain from hearing a particular controversy related to a case under Title 11 "in the interest of justice, or in the interest of comity with state court or respect for state law." The Ninth Circuit has summarized the factors which a court should consider when deciding whether to abstain:

> (1) [T]he effect or lack thereof on the efficient administration of the estate if a Court rec-

> ommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of serving state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

In re Tucson Estate, Inc., 912 F.2d 1162, 1167 (9th Cir. 1990), (*quoting In re Republic Reader's Serv., Inc.*, 81 B.R. 422, 429 (Bankr. S.D. Tex. 1987)). These defendants could not remove this action pursuant to § 1332 because diversity is absent. This court will abstain and will remand insofar as the motion to remand is based on § 1452(c). Equity and comity require this court to exercise its right of discretionary abstention in the present removal context and to remand the case to the Alabama Court in Marengo County. This court will do so by separate order.

DONE this 11th day of January, 1995.

/s/ WILLIAM M. ACKER, JR.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

KATHY ANN ELLEN, ET AL.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION NO.
	)	
VS.	)	94-AR-2679-E
	)	
VOYAGER INSURANCE	)	
COMPANY, ET AL.,	)	
	)	
Defendants.	)	
	)	

ORDER

Defendants' motion to reconsider order of abstention and remand entered on January 11, 1995, was heard at this court's January 26, 1995 motion docket. In accordance with the accompanying memorandum opinion, the said motion is hereby DENIED. Nevertheless, the Clerk shall forward to the Clerk of the Circuit Court of Marengo County, Alabama, all materials filed in this court after the order of remand.

DONE this 3rd day of February, 1995.

/s/ WILLIAM M. ACKER, JR.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

KATHY ANN ELLEN, ET AL.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION NO.
	)	
VS.	)	94-AR-2679-E
	)	
VOYAGER INSURANCE	)	
COMPANY, ET AL.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

On January 11, 1995, this court remanded the instant case to the Circuit Court of Marengo County, Alabama pursuant to 28 U.S.C. §§ 1447(d) and 1452(b). On January 17, 1995, defendants moved the court to reconsider.

As a threshold question, this court must address whether having remanded the case forecloses the court's reconsideration of that decision. Although defendants present some interesting legal issues, the court concludes that 28 U.S.C. § 1447(d) precludes this court from now deciding them.

28 U.S.C. § 1447(d)

With the exception of civil rights actions, orders of remand pursuant to 28 U.S.C. § 1447 are not reviewable by the remanding district court. Section 1447(d) provides, in pertinent part:

> An order remanding a case to the State court from which it was removed is not reviewable on

> appeal *or otherwise*, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(emphasis supplied). This was not a § 1443 removal. The Supreme Court of the United States explained the policy underlying § 1447(d) as:

> [N]ot permitting interrupting the litigation of the merits of a removal cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.

United States v. Rice., 327 U.S. 742, 751, 66 S. Ct. 835, 839 (1946). As one commentator said:

> Subsection (d) of § 1447 means exactly what it says. Subject to cases removed pursuant to § 1443 and minor statutory exceptions involving Indian lands, the *district* court's remand order is ordinarily not reviewable by appeal, including an interlocutory appeal under § 1292(a) or § 1292(b); by mandamus; *or by any indirect method.*

1A JAMES W. MOORE, BRETT A. RINGLE & JEREMY C. WICKER, MOORE'S FEDERAL PRACTICE ¶ 0.169[2.-1] (1993) (footnotes omitted) (emphasis supplied). Thus, this court has no choice but to decline an invitation to reconsider a § 1447 order of remand. *See Robertson v. Ball*, 534 F.2d 63, 66 n.5 (11th Cir. 1976) (*per curiam*) ("[O]nce the federal district court considers the proper factors and decides to remand, the action should go forward in state court without the further delay of appeal, and without regard to whether the federal district court was correct or incorrect."); *Seedman v. U.S. Dist. Court for Cent. Dist. of California*, 837 F.2d 413, 414 (9th Cir. 1988) (*per curiam*) ("Once a district court certifies a remand order to state court it is divested of jurisdiction and can take no further action on the case."); *New Orleans Pub. Serv., Inc. v.*

Majour, 802 F.2d 166, 167 (5th Cir. 1986) (*per curiam*) ("The only vehicle for relief from a remand order is the writ of mandamus.").

In the context of motions to reconsider § 1447 remand orders, a fellow judge in this district denied such a motion, holding:

> Remand orders based on section 1447(c) are unreviewable on "appeal or otherwise," 28 U.S.C. § 1447(d). This statutory language has been universally construed to preclude not only appellate review but also reconsideration by the district court. Once a district court certifies a remand order to state court it is divested of jurisdiction and can take no further action on the case.

Shoals T.V. & Appliance v. Auto Owners Inc. Co., 791 F. Supp. 283, 287 (N.D. Ala. 1992). In fact, this very court has refused to reconsider an order of remand. *See Davis v. American Gen. Group Ins. Co.*, 732 F. Supp. 1132, 1135 (N.D. Ala. 1990) ("The court has received a purported motion by American General Group Insurance Company to reconsider the remand order entered by this court on March 12, 1990. Apparently, American General is unfamiliar with this court's lack of jurisdiction to consider such a motion after remand."). Although neither *Shoals T.V. & Appliance* nor *Davis* constitutes binding precedent, they would be entitled to substantial deference even if they were the only judicial expressions on this subject.

Although the court may not review its own remand order, it will indulge in a few gratuitous comments for what they may be worth. The main thrust of defendant's argument, never supported before the order of remand by the materials offered at the January 26, 1995 hearing, was that defendant Albert B. Sprouse ("Sprouse") is also

a defendant in a prior case pending in Talladega County and that the Alabama abatement rule precludes Sprouse's being a defendant in the Marengo County action which was brought by the same plaintiff, Jackie E. Whitson ("Whitson"). During argument, counsel for Whitson purported to move for a dismissal without prejudice of Whitson's action in Marengo County. If such a motion is granted, it would leave Kathy Ann Ellen ("Ellen") as the only named plaintiff and render moot defendants' contention that Sprouse is not a bona fide non-diverse defendant in the Marengo County case, thus creating full diversity. Because this court lacks jurisdiction to set aside its remand order, likewise it cannot entertain the motion by Whitson, but this court can and does forward Whitson's oral motion to the Circuit Court of Marengo County, expressing the belief that Whitson is judicially estopped from proceeding further as a named plaintiff in the Marengo County case, so that Ellen should at present be the only named plaintiff there.

Defendants' motion for reconsideration will be denied by separate order.

DONE this 3rd day of February, 1995.

/s/ WILLIAM M. ACKER, JR.

WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

KATHY ANN ELLEN and JACKIE WHITSON,	)	
Plaintiff,	)	
v.	)	
VOYAGER INSURANCE CO., et al.,	)	CIVIL ACTION NO. 94-0525-BH-C
Defendants.	)	

ORDER

The Court, in relation to all pending motions, has considered the parties' respective supplemental briefs and evidence together with the record as a whole. The Court feels compelled initially to deal with those motions which relate to venue, namely defendants' motion to transfer venue (Tab 9) and plaintiffs' motion to remand (Tab 12), in an effort to avoid premature adjudication of issues better left to the court ultimately vested with jurisdiction.

The Court has first considered plaintiffs' motion to remand. The Court is simply not satisfied that, having presented a claim for punitive damages and having obtained an ex parte certification of its proposed class by the state court, plaintiffs' contention regarding jurisdictional amount is presented in good faith. Neither is the

Court satisfied that remand is necessitated by 28 U.S.C. § 1334(c). In spite of this opinion, the Court will defer ruling on this motion in view of the following decision.

The Court concludes that plaintiffs' opposition to defendants' motion to transfer venue (Tab 9) is sophistic. Plaintiffs essentially argue that the insurance company defendants have agents in every Alabama county and have both sold credit life insurance and made misrepresentation in almost every such county in the state, including Marengo County.[1] According to plaintiffs, "from the standpoint of where the tortious acts occurred and where the witnesses [i.e., "class members and Voyagers' agents] reside, Marengo County is as convenient as any other venue in the State of Alabama." Plaintiffs' Supplemental Brief (Tab 26) at 15. Plaintiffs have not, however, either refuted defendants' contention that "[t]he only defendants doing business by agent in Marengo County, Alabama are Voyager Life Insurance Company and Voyager Guaranty Insurance Company [which] are not involved in the matters alleged in the Complaint" (Defendants' Motion to Transfer at ¶ 1) or presented the identity of any class member who purchased the subject insurance in Marengo County, Alabama. Neither do plaintiffs dispute that: (1) Defendant Albert Sprouse, Jr., is a resident of Talladega County, Alabama; (2) Plaintiffs Whitson and Ellen, who seek to be the named representatives of a class, are residents of Talladega County; (3) either Talladega County, Alabama, or the Northern District of Alabama is not the situs of the purchases of consumer

---

[1]Defendants surmised at oral arguments on September 29, 1994, that plaintiffs' choice of Marengo County, Alabama, was associated with plaintiffs' ability to obtain ex parte class action certification within 19 days of filing the complaint. Plaintiffs' counsel responded only that he has scattered similar class actions around the State of Alabama so as not to place a burden on rural courts. The Court is not impressed with plaintiffs' explanation.

goods and the misrepresentations to plaintiffs Whitson and Ellen; (4) the books and records concerning the purchases of consumer goods and the misrepresentations to plaintiffs Whitson and Ellen are located in Talladega County, Alabama, or the Northern District of Alabama; (5) Plaintiff Whitson filed a lawsuit against Defendant Sprouse in the Circuit Court of Talladega County, Alabama, which alleges the commission of wrongs identical to the case at bar with the sole exception of the conspiracy claim; (6) Plaintiff Ellen filed a petition pursuant to Chapter 13 of the Bankruptcy Code in the Bankruptcy Court for the Northern District of Alabama and any monetary relief obtained in this action is property of the bankruptcy estate; (7) the lawyers for both the plaintiffs and the defendants maintain offices in the Northern District of Alabama; and (8) this action could have been initiated in the Northern District of Alabama. The Court therefore concludes that, for the convenience of the parties and in the interests of justice, the case is due to be transferred to the United States District Court for the Northern District of Alabama pursuant to 28 U.S.C. § 1404(a). Accordingly, it is ORDERED that defendants' motion to transfer venue be and is hereby GRANTED. The Clerk of this Court is directed to take such steps as are necessary to transfer the record to the United States District Court for the Northern District of Alabama.

The Court will not further interject itself into this action and thus leaves the other pending motions, and the dispute concerning the propriety of the state court's ex parte certification of a class, to the transferee court.

Done this 31st day of October, 1994.

/s/ W. B. Hand

SENIOR DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA NORTHERN DIVISION

KATHY ANN ELLEN and JACKIE WHITSON,	)	
Plaintiff,	)	
v.	)	
VOYAGER INSURANCE CO., et al.,	)	CIVIL ACTION NO. 94-0525-BH-C
Defendants.	)	

ORDER

Upon consideration of the motion filed by Albert Benjamin Sprouse (Sprouse) to reconsider the Court's denial of defendant's motion to transfer (Tab 21) together with defendants' respective responses to plaintiffs' motion to remand (Tabs 22 and 23), the Court concludes that the issues raised in all the motions now pending[1] are

[1]The motions now pending before the Court include: (1) Sprouse's motion to dismiss or in the alternative for a more definite statement (Tab 4); motion by Voyager Life & Health Insurance Company, Voyager Property & Casualty Insurance Company and Voyager Group, Inc. to quash service of process and to dismiss for lack of personal jurisdiction (Tab 7); motion by Voyager Guaranty Insurance Company and Voyager Life Insurance Company to dismiss or in the alternative for a more definite statement (Tab 8); defendants' motion to transfer venue (Tab 9); and plaintiffs' motion to remand (Tab 12).

interrelated, that the Court precipitously denied the motion to transfer and that oral arguments would assist the Court in resolving the aforementioned motions.

It is therefore ORDERED that the order of this Court entered August 3, 1994, be and is hereby VACATED and that the parties APPEAR before the Court at 9:00 a.m. on Wednesday, September 28, 1994 at the United States Courthouse in Selma, Alabama, to argue their respective positions regarding each of the pending motions in this action. The Court is particularly interested in the following:

1. Plaintiffs' basis for contending that personal jurisdiction exists as to defendants Voyager Life & Health Insurance Company, Voyager Property & Casualty Insurance Company and Voyager Group, Inc.

2. A reason this Court ought not to deny the motion filed by Voyager Guaranty Insurance Company and Voyager Life Insurance Company, to the extent it seeks dismissal of the complaint, on the grounds that these defendants have failed to file a brief in support of the motion in compliance with Local Rule 6 of this Court.

3. Plaintiffs' basis for contending that the claims asserted against Sprouse in this action are not identical to those asserted against Sprouse in Whitson v. Farmer's Furniture of Alabama, Inc., Civil Action No. CV-94-177 (Cir. Ct. Talladega Co.) inasmuch as the latter action clearly alleges misrepresentation and suppression with respect to the purchase of "non-filing insurance for the purposes of perfecting a security interest in the furniture and jewelry [purchased by the plaintiff]." Talladega Complaint at ¶ 7.

4. Plaintiff Ellen's basis for asserting a claim against Sprouse if Whitson's claims against Sprouse abated under Alabama law.

5. Plaintiffs' basis for contending that venue lies within either Marengo County, Alabama, or the Southern District of Alabama.

6. Plaintiffs' basis for contending that either Talladega County, Alabama, or the Northern District of Alabama is not the situs of the purchases of consumer goods and the misrepresentations at issue in this litigation and thus more convenient for the parties and witnesses in this action.

7. Plaintiffs' reply to Sprouse's arguments concerning jurisdiction under 28 U.S.C. § 1334(b) by virtue of Ellen's Chapter 13 bankruptcy petition.

8. Sprouse's basis for contending that: (1) one who is neither a creditor nor the debtor has standing to assert jurisdiction under 28 U.S.C. § 1334(b); (2) a Trustee's control of assets in a Chapter 7 or Chapter 11 case is similar to that in a Chapter 13 case; and (3) this Court ought not to be guided by *In re Brateman Bros., Inc.*, 135 B.R. 853, 856 (Bankr. N.D. Ind. 1991), a case he himself relied upon, to the extent it clearly holds that "[t]o allow ["a stranger to the litigation involving the bankruptcy estate"] to remove the action will effectively deprive the trustee of his legitimate choice of forum."

This list is not to be treated by the parties as a limitation on the scope of their arguments or the Court's questions relative to the pending motions. The parties are to be prepared to fully address each of the pending motions.

As a final matter, the Court has considered the motions of B. Clark Carpenter, Jr. (Tab 16), William S. Pritchard, III (Tab 17) and James G. Henderson (Tab 18) to appear *pro hac vice* for defendant Sprouse and concludes that they are due to be granted. It is therefore ORDERED that these motions to appear *pro hac vice* be and are hereby GRANTED.

DONE this 22nd day of August, 1994.

/s/ W. B. Hand
SENIOR DISTRICT JUDGE

APPENDIX F

IN THE CIRCUIT COURT OF
MARENGO COUNTY, ALABAMA

KATHY ANN ELLEN; JACKIE E. WHITSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
VS.	)	CASE NUMBER CV-94-069
VOYAGER INSURANCE COMPANIES, a corporation; VOYAGER GUARANTY INSURANCE COMPANY, a corporation; VOYAGER LIFE AND HEALTH INSURANCE COMPANY, a corporation; VOYAGER LIFE INSURANCE COMPANY, a corporation; VOYAGER GROUP, INC., a corporation; VOYAGER PROPERTY AND CASUALTY INSURANCE COMPANY, a corporation; ALBERT BENJAMIN SPROUSE, JR.; No. 1, whether singular or plural, that entity or those entities who or which issued the policies of insurance which are the basis of this complaint; No. 2, whether singular or plural, that entity or thoseentities, who or which extended consumer credit to the plaintiffs or assisted in the extension of consumer credit to the plaintiffs	)	

on the occasions made the basis of)
this complaint; No. 3, whether)
singular or plural, that entity or)
those entities, who or which re-)
ceived any sum of money from any)
source whatsoever resulting from)
the execution of the consumer loan)
agreements which are the subject of)
this litigation; No. 4, whether singu-)
lar or plural, that entity or those)
entities, who or which received)
money from any source whatsoever)
resulting from the sale to plaintiffs)
of the policies of insurance which)
are the subject of this litigation; No.)
5, whether singular or plural, that)
entity or those entities, doing busi-)
ness as VOYAGER INSURANCE)
COMPANIES; No. 6, whether singu-)
lar or plural, that entity or those)
entities who or which provided any)
services with regard to the insurance)
policies purchased by the plaintiffs;)
No. 7, whether singular or plural,)
that entity or those entities, who or)
which is the successor in interest for)
any named or fictitious party defen-)
dants; No. 8, whether singular or)
plural, that entity or those entities,)
who or which engaged in a pattern)
or practice of illegal or wrongful)
conduct in order to sell similar)
policies of insurance providing)
similar benefits to policyholders)
similarly situated to the plaintiffs;)
No. 9, whether singular or plural,)

that entity or those entities, who or which engaged in a scheme, artifice, combination or conspiracy to defraud the plaintiffs and similar policyholders in order to obtain premiums from the sale of an insurance product such as the one made the basis of this suit and/or deprived such policyholders of the benefits of an insurance product such as the one made the basis of this suit. Plaintiffs aver that the identity of the fictitious party defendants herein is otherwise unknown to plaintiffs at this time or, if their names are known to plaintiffs their identity as proper party defendants is not known to plaintiffs at this time, and their true names will be substituted by amendment when the aforesaid lacking knowledge is ascertained,

Defendants.

SUMMONS.

This service by certified mail of this Summons is initiated upon the written request of plaintiffs' attorney pursuant to the Alabama Rules of Civil Procedure.

NOTICE TO: VOYAGER INSURANCE COMPANIES, a corporation; VOYAGER GUARANTY INSURANCE COMPANY, a corporation; VOYAGER LIFE AND HEALTH INSURANCE COMPANY, a corporation; VOYAGER LIFE INSURANCE COMPANY, a corporation;

VOYAGER GROUP, INC., a corporation; VOYAGER PROPERTY AND CASUALTY INSURANCE COMPANY, a corporation; ALBERT BENJAMIN SPROUSE, JR.; No. 1, whether singular or plural, that entity or those entities, who or which issued the policies of insurance which are the basis of this complaint; No. 2, whether singular or plural, that entity or those entities, who or which extended consumer credit to the plaintiffs or assisted in the extension of consumer credit to the plaintiffs on the occasions made the basis of this complaint; No. 3, whether singular or plural, that entity or those entities, who or which received any sum of money from any source whatsoever resulting from the execution of the consumer loan agreements which are the subject of this litigation; No. 4, whether singular or plural, that entity or those entities, who or which received money from any source whatsoever resulting from the sale to plaintiffs of the policies of insurance which are the subject of this litigation; No. 5, whether singular or plural, that entity or those entities, doing business as VOYAGER INSURANCE COMPANIES; No. 6, whether singular or plural, that entity or those entities, who or which provided any services with regard to the insurance policies purchased by the plaintiffs; No. 7, whether singular or plural, that entity or those entities, who or which is the successor in interest for any named or fictitious party defendants; No. 8, whether singular or plural, that entity or those entities, who or which engaged in a pattern or practice of illegal or wrongful conduct in order to sell similar policies of insurance providing similar benefits to policyholders similarly situated to the plaintiffs; No. 9, whether singular or plural, that entity or those entities, who or which engaged in a scheme, artifice, combination or conspiracy to defraud the plaintiffs and similar policyholders in order to obtain premiums from the sale of an insurance product such as the one made the basis of this suit and/or

deprived such policyholders of the benefits of an insurance product such as the one made the basis of this suit. Plaintiffs aver that the identity of the fictitious party defendants herein is otherwise unknown to plaintiffs at this time or, if their names are known to plaintiffs their identity as proper party defendants is not known to plaintiffs at this time, and their true names will be substituted by amendment when the aforesaid lacking knowledge is ascertained.

Defendants.

The Complaint which is attached to this Summons is important and you must take immediate action to protect your rights. You are required to mail or hand deliver a copy of a written Answer, either admitting or denying each allegation in the Complaint to:

LLOYD W. GATHINGS, ESQ.
TAYLOR, GATHINGS & ROBERSON
2112 FIRST AVENUE NORTH
BIRMINGHAM, ALABAMA 35203

THIS ANSWER MUST BE MAILED OR DELIVERED WITHIN THIRTY (30) DAYS FROM THE DATE OF DELIVERY OF THIS SUMMONS AND COMPLAINT AS EVIDENCED BY THE RETURN RECEIPT, OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT. You must also file the original of your Answer with the Clerk of this Court within a reasonable time afterward.

Dated: _____ CLERK OF CIRCUIT COURT

IN THE CIRCUIT COURT OF
MARENGO COUNTY, ALABAMA

KATHY ANN ELLEN; JACKIE E. WHITSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
VS.	)	CASE NUMBER CV-94-069
VOYAGER INSURANCE COMPANIES, a corporation; VOYAGER GUARANTY INSURANCE COMPANY, a corporation; VOYAGER LIFE AND HEALTH INSURANCE COMPANY, a corporation; VOYAGER LIFE INSURANCE COMPANY, a corporation; VOYAGER GROUP, INC., a corporation; VOYAGER PROPERTY AND CASUALTY INSURANCE COMPANY, a corporation; ALBERT BENJAMIN SPROUSE, JR.; No. 1, whether singular or plural, that entity or those entities who or which issued the policies of insurance which are the basis of this complaint; No. 2, whether singular or plural, that entity or those entities, who or which extended consumer credit to the plaintiffs or assisted in the extension of consumer credit to the plaintiffs on the occasions made the basis of this complaint; No. 3,	)	

whether singular or plural, that entity or those entities, who or which received any sum of money from any source whatsoever resulting from the execution of the consumer loan agreements which are the subject of this litigation; No. 4, whether singular or plural, that entity or those entities, who or which received money from any source whatsoever resulting from the sale to plaintiffs of the policies of insurance which are the subject of this litigation; No. 5, whether singular or plural, that entity or those entities, doing business as VOYAGER INSURANCE COMPANIES; No. 6, whether singular or plural, that entity or those entities who or which provided any services with regard to the insurance policies purchased by the plaintiffs; No. 7, whether singular or plural, that entity or those entities, who or which is the successor in interest for any named or fictitious party defendants; No. 8, whether singular or plural, that entity or those entities, who or which engaged in a pattern or practice of illegal or wrongful conduct in order to sell similar policies of insurance providing similar benefits to policyholders similarly situated to the plaintiffs; No. 9, whether singular or plural, that entity or those entities, who or

which engaged in a scheme, artifice, combination or conspiracy to defraud the plaintiffs and similar policyholders in order to obtain premiums from the sale of an insurance product such as the one made the basis of this suit and/or deprived such policyholders of the benefits of an insurance product such as the one made the basis of this suit. Plaintiffs aver that the identity of the fictitious party defendants herein is otherwise unknown to plaintiffs at this time or, if their names are known to plaintiffs their identity as proper party defendants is not known to plaintiffs at this time, and their true names will be substituted by amendment when the aforesaid lacking knowledge is ascertained,

Defendants.

COMPLAINT

1. Plaintiffs bring this action on behalf of themselves and all members of a class composed of those individuals who, during the course of executing a consumer loan agreement in Alabama, have purchased a policy of Credit Property Insurance and/or a policy of Non-Filing Insurance issued and/or serviced by the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.;

Voyager Property and Casualty Insurance Company; and Albert Benjamin Sprouse, Jr. Plaintiffs aver that the class is so numerous that joinder of all members is impracticable. The exact size of plaintiffs' class is not known, but the size of the class and the identification of its members is subject to precise determination through information within the exclusive control of the defendants. Plaintiffs aver that there are questions of law and fact common to the class as set out in the various counts of the complaint hereinafter. Plaintiffs further aver that their claims as representatives of the class are typical of the claims of the class. Plaintiffs further aver that in their representative capacity they will fairly and adequately protect the interests of the class.

2. Plaintiffs aver that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. The questions of law or fact which are common to the plaintiffs' class include inter alia; whether defendants misrepresented to each plaintiff that the premium assessed for non-filing insurance was used to purchase a policy of insurance in lieu of perfecting a security interest in property; whether defendants conspired together with retailers to deprive each plaintiff of the premium assessed for non-filing insurance by representing to said plaintiff that the premium was used to purchase a policy of insurance in lieu of perfecting a security interest in property; whether defendants wrongfully concealed from plaintiffs that the fee assessed for non-filing insurance would not be used to purchase a policy of insurance in lieu of perfecting a security interest in property, that the credit property insurance was sold in an amount in excess of the replacement value of the insured property, and that the said consumer loan agreement contained excessive and undisclosed finance charges; whether defendants misrepresented to each plaintiff that the purchase of credit prop-

erty insurance in an amount equal to the total of payments of each loan was necessary; and whether defendants conspired together to deprive each plaintiff of the premium assessed for credit property insurance by misrepresenting to said plaintiff that the purchase of credit property insurance in an amount equal to the total of payments of each loan was necessary.

3. Plaintiffs aver that a class action is superior to other available methods for the fair and efficient adjudication of the controversy because, inter alia: (a) The commonality of issue of law and fact, as well as the relatively small liability to each class member substantially diminishes the interest of members of the class in individually controlling the prosecution of separate actions; (b) many of the members of plaintiffs' class are unaware of their rights to prosecute and do not have the means or resources to secure legal assistance; (c) there has been little, if any, litigation already commenced by members of the class to determine the questions presented; (d) it is desirable that the claims be concentrated in this forum and; (e) a class action can be managed without undue difficulty since the defendants have regularly committed the violations complained of herein, have used standardized forms in doing so, and are required to have records of their dealings with each member of the class.

COUNT I

4. Plaintiffs reallege the allegations of paragraph 1 and incorporate those allegations herein by reference.

5. On or about the date of execution of each consumer contract by each plaintiff described in paragraph 1 above, the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and

Casualty Insurance Company; Albert Benjamin Sprouse, Jr.; and all fictitious defendants, represented to each plaintiff that the premium assessed for non-filing insurance was used to purchase a policy of insurance in lieu of perfecting a security interest in property. Said misrepresentation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein.

6. The representations made by said defendants were false and the defendants knew they were false, or defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the fee assessed for non-filing insurance did not in fact represent the premium for the purchase of a policy of insurance in lieu of perfecting a security interest in property, and said premium was not in fact used to purchase a policy of "non-filing insurance." In reliance upon said representations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "non-filing insurance."

7. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for non-filing insurance.

WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count I, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT II

8. Plaintiffs reallege the allegations of paragraph 1, and incorporate those allegations herein by reference.

9. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 1 above, the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; and Albert Benjamin Sprouse, Jr.; and all fictitious defendants, conspired together with retailers to deprive each plaintiff of the premium assessed for "non-filing insurance" by representing to said plaintiff that the premium was used to purchase a policy of insurance in lieu of perfecting a security interest in property. Said representation was made to each plaintiff in the language of the consumer loan contract by each plaintiff herein.

10. The representations made by said defendants were false and the defendants knew they were false, or defendants recklessly misrepresented the facts or the defendants misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the fee assessed for non-filing insurance did not in fact represent the premium for the purchase of a policy of insurance in lieu of perfecting a security interest in property, and said premium was not in fact used to purchase a policy of non-filing insurance. In reliance upon said representations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "non-filing insurance."

11. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for non-filing insurance.

WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count II, in a sum which

represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT III

12. Plaintiffs reallege the allegations of paragraph 1, and incorporate those allegations herein by reference.

13. On or about the date of the execution of the consumer loan by each plaintiff in the class named above, the defendants; Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; Albert Benjamin Sprouse, Jr.; and all fictitious defendants were under an obligation to disclose to the plaintiffs all facts material to the execution of the consumer loan agreement and the insurance policies sold at the time the consumer loan agreements were entered into. This obligation to disclose arose by reason of the superior knowledge of the said defendants concerning Alabama insurance and consumer finance law and by the particular facts and circumstances of these type transactions. While under the foregoing duty to disclose the said defendants concealed from each plaintiff the following facts:

a. That the fee assessed for "non-filing insurance" would not be used to purchase a policy of insurance in lieu of perfecting a security interest in property;

b. That the Credit Property Insurance was sold in an amount in excess of the replacement value of the insured property;

c. That the said consumer loan agreement contained excessive and undisclosed finance charges.

14. Said defendants concealed said facts from the plaintiffs knowingly and with the intention that the plaintiffs be deceived thereby.

15. As a proximate result of the deceit of the said defendants, plaintiffs were damaged by being induced to pay money to the said defendants for the purchase of said insurance.

WHEREFORE, premises considered, plaintiffs pray for a judgment against the defendants named above, under the allegations of Count III, in a sum representing both compensatory and punitive damages in an amount to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT IV

16. Plaintiffs reallege the allegations of paragraph 1, and incorporate those allegations herein by reference.

17. On or about the date of execution of each consumer contract by each plaintiff described in paragraph 1 above, the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; Albert Benjamin Sprouse, Jr.; and the fictitious defendants, represented to each plaintiff that the purchase of credit property insurance in an amount equal to the "total of payments" of each loan was necessary. Said misrepresentation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein and in the language of the credit property insurance certificate.

18. The representations made by said defendants were false and the defendants knew they were false, or defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention

that plaintiffs rely upon them. The representations were false in that the credit property insurance, which was sold in an amount in excess of any insurable interest and in excess of the replacement value of the collateral, was not necessary and was sold in an unlawful amount. In reliance upon said representations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "property insurance premium."

19. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for "property insurance premiums."

WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count IV, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT V

20. Plaintiffs reallege the allegations of paragraph 1, and incorporate those allegations herein by reference.

21. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 1 above, the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; Albert Benjamin Sprouse, Jr.; and all fictitious defendants, conspired together to deprive each plaintiff of the premium assessed for credit property insurance by representing to said plaintiff that the purchase of credit property insurance in an amount equal to the "total of payments" of each loan

was necessary. Said representation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein and in the language of the credit property insurance certificate.

22. The representations made by said defendants were false and the defendants knew they were false, or defendants recklessly misrepresented the facts or the defendants misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the credit property insurance, which was sold in an amount in excess of any insurable interest and in excess of the replacement value of the collateral, was not necessary and was sold in an unlawful amount. In reliance upon said representations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "property insurance premium."

23. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for "property insurance premiums."

WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count V, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

/s/ Lloyd W. Gathings
Lloyd W. Gathings
Attorney for Plaintiffs

OF COUNSEL:
Taylor, Gathings & Roberson
2112 First Avenue North
Birmingham, AL 35203
(205) 323-3300

/s/ Harvey B. Campbell, Jr.
Harvey B. Campbell, Jr.
Attorney for Plaintiffs

OF COUNSEL:
Campbell & Campbell
Post Office Drawer 756
Talladega, AL 35160
(205) 761-1858

/s/ Huel M. Love, Jr.
Huel M. Love, Jr.
Attorney for Plaintiffs

OF COUNSEL:
Love, Love & Love, P.C.
Post Office Box 517
Talladega, AL 35160
(205) 362-6670

PLAINTIFFS DEMAND A TRIAL BY STRUCK JURY.

/s/ Lloyd W. Gathings
Lloyd W. Gathings

PLAINTIFFS' ADDRESSES

Kathy Ann Ellen
Rt. 2, Box 3017
Pell City, Alabama 35125

Jackie E. Whitson
144 A Northwood Apt.
Talladega, Alabama 35160

DEFENDANTS TO BE SERVED AS FOLLOWS:

By Certified Mail:

Voyager Insurance Companies
P.O. Box 2918
Jacksonville, Florida 32203

Voyager Guaranty Insurance Company
P.O. Box 901045
Fort Worth, Texas 76101

Voyager Life and Health Insurance Company
60 Executive Park South, Suite 300
Atlanta, Georgia 30329

Voyager Life Insurance Company
P.O. Box 901045
Fort Worth, Texas 76101

Voyager Group, Inc.
P.O. Box 901045
Fort Worth, Texas 76101

Voyager Property and Casualty Insurance Company
110 West 7th St.
Fort Worth, Texas 76102

Albert Benjamin Sprouse, Jr.
715 East Battle Street
Talladega, Alabama 35160

APPENDIX G

IN THE CIRCUIT COURT OF
MARENGO COUNTY, ALABAMA

KATHY ANN ELLEN; JACKIE E. WHITSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
VS.	)	CASE NUMBER CV-94-69
VOYAGER PROPERTY AND CASUALTY INSURANCE COMPANY, et al.,	)	
Defendants.	)	

ORDER GRANTING CONDITIONAL
CLASS CERTIFICATION

The plaintiffs complaint in the above-styled action requested certification of this action as a class action against the named defendants. The law is well established that the Court should certify a class action "[a]s soon as practicable after the commencement of an action brought as a class action" and that the order certifying the class action may be conditional. Rule 23(c)(1) Ala. R. Civ. P. After due deliberation and consideration of the totality of the circumstances and the record, and for good cause shown, it is hereby ORDERED that:

1. Civil Action No. *CV 94-69*, styled *Kathy Ann Ellen, et al. v. Voyager Property and Casualty Insurance Company, et al.*, is hereby conditionally certified as a class action pur-

suant to the Alabama Rules of Civil Procedure, Rule 23(b)(2). The class hereby certified consists of:

> Any Alabama residents who, during the course of executing a consumer loan agreement in Alabama, have purchased a policy of Credit Property Insurance and/or a policy of Non-Filing Insurance issued and/or serviced by the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; and Voyager Property and Casualty Insurance Company.

The class *does not* include the following:

> (1) Any Alabama resident who has previously filed or settled his or her claims against Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; or obtained a judgment in any court against any of said Defendants on any claims arising out of the purchase of Credit Property Insurance and/or a policy of Non-filing Insurance issued and/or serviced by the defendants; or (2) any person who is deceased at the time of the certification of the class described above.

Certification of the class and the findings in this order are conditional pending further discovery and procedures with regard to final certification of the class.

2. Kathy Ann Ellen and Jackie E. Whitson are designated as class representatives, and Lloyd W. Gathings, Harvey B. Campbell, Jr. and Huel Love, Jr. are designated as counsel for the class.

3. The Court makes the following findings: that the named plaintiffs and class counsel are adequate repre-

sentatives of and for the Class, and that all requirements of Rules 23(a) and 23(b)(2) Alabama Rules of Civil Procedure are met; that the class is so numerous that the joinder of all members is impracticable; that class counsel are able and experienced and will adequately represent the class; that there are questions of law and fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; the named plaintiffs are adequate representatives of the class; and that the plaintiffs will fairly and adequately represent the interests of the class. The Court finds that maintenance of this action as a class action pursuant to Rule 23(b)(2) Alabama Rules of Civil Procedure is superior to any other means of adjudicating the claims herein raised.

4. Pending determination of this class action, the named plaintiffs and all members of the described class are hereby enjoined and prohibited from commencing any action, either directly, individually, representatively, or in any capacity, asserting any claims set forth in the complaint filed in this case.

5. Defendants shall provide to the plaintiffs within 45 days from the date of this order the names and last known addresses of all persons said Defendants' records indicate would fall within the above-described class.

6. Plaintiffs shall notify all persons whose names are produced in accordance with paragraph 5 above of this action, including a copy of this order in such notification, by U.S. Mail within 30 days after such names and addresses are produced.

DONE, ORDERED, ADJUDGED AND DECREED, this 7th day of July, 1994.

/s/ Claud D. Neilson

Claud D. Neilson
Circuit Court Judge

APPENDIX H

IN THE CIRCUIT COURT OF
TALLADEGA COUNTY, ALABAMA

JACKIE E. WHITSON,	*	
	*	
Plaintiffs	*	
	*	CASE NUMBER
vs.	*	CV 94-177
	*	
FARMERS FURNITURE OF ALABAMA, INC.; RICHARD MCQUEEN, an individual; ALBERT BENJAMIN SPROUSE, an individual; Number 1, whether singular or plural, who or which extended consumer credit to the plaintiffs or assisted in the extension of consumer credit to the plaintiffs on the occasions made the basis of this complaint Number 2, whether singular or plural, who or which received any sum of money from any source whatsoever resulting from the of the consumer loan which are the subject of this litigation; Number 3, whether singular or plural, who or which received money from any source whatsoever resulting from the sale to plaintiffs of the policies of insurance which are the subject of this litigation; Number 4, being that legal entity doing business as FARMERS FURNITURE;	*	
	*	
DEFENDANTS	*	

CONSOLIDATED AND AMENDED COMPLAINT

Comes now the plaintiff in the above styled cause, and, pursuant to the provisions of Rules 15 A.R.Civ.P., amends her complaint to add Aubrey J. Strickland Jr., Robyn Gamble, and Rena Yates as parties plaintiff; to correct the name of the defendant designated as Farmers Furniture of Alabama, Inc. to be properly named as Warehouse Home Furnishing Distributors, Inc.; to describe the fictitious defendants named above and in the complaint below; and to add the following claims and allegations:

1. Plaintiffs bring this action on behalf of themselves and all members of a class composed of those individuals who have obtained a consumer loan from defendant Warehouse Home Furnishing Distributors Inc. d/b/a Farmers Furniture in the State of Alabama, and who, during the course of executing the loan agreement, have been assessed a fee by the said Warehouse Home Furnishing Distributors Inc. d/b/a Farmers Furniture which is designated in the consumer contract as "NON-FILING INS." Included within said class is a subclass of individuals who, in addition to being assessed a fee designated as "NON-FILING INS." have also purchased a policy of credit property insurance. Also included within said class is a subclass of individuals who, in addition to being assessed a fee designated as "NON-FILING INS." have also purchased an extended warranty purportedly issued by the said Warehouse Home Furnishing Distributors Inc., d/b/a Farmers Furniture. Plaintiffs aver that the class is so numerous that joinder of all members is impracticable. The exact size of plaintiffs' class is not known, but the size of the class and the identification of its members is subject to precise determination through information within the exclusive control of the defendants. Plaintiffs aver that there are questions of law and fact common to the class as set out in the various counts of the complaint

hereinafter. Plaintiffs further aver that their claims as representatives of the class are typical of the claims of the class. Plaintiffs further aver that in their representative capacity they will fairly and adequately protect the interests of the class.

2. Plaintiffs aver that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. The questions of law or fact which are common to the plaintiffs' class include inter alia: whether, under the provisions of the Alabama Mini-Code, the defendant, Warehouse Home Furnishing Distributors Inc. d/b/a Farmers Furniture, may exempt from the finance charge a premium for insurance in lieu of perfecting a security interest in property when the security for said debt is automatically perfected without filing; whether the charge assessed to each plaintiff for the purchase of a policy of non-filing insurance was in fact used to purchase a policy of "insurance in lieu of perfecting a security interest in property," as that term is defined by the Alabama Mini-Code; whether, under the provisions of the Alabama Mini Code, the premium for said non-filing insurance constitutes a finance charge; whether the total finance charge assessed in each consumer loan exceeds the maximum finance charge permitted by the Alabama Mini-Code and if so whether the underlying obligation is thereby rendered void; whether the imposition of a fee for non-filing insurance constitutes fraud; whether the defendants were under any obligation to disclose to the plaintiffs that the lien insurance premium would not be used to purchase a policy of insurance in lieu of perfecting a security interest in property; whether the premium for credit property insurance constitutes a finance charge when the amount of insurance purchased exceeds the replacement cost of the insured property, and if so, whether the total finance charge in each consumer credit transaction wherein a

policy of credit property insurance was sold exceeds the maximum finance charge permitted by the Alabama Mini-Code; whether the defendants were under any obligation to disclose to the plaintiffs that the credit property insurance was sold in an amount in excess of the replacement value of the insured property; whether the extended warranty purchased by each plaintiff in the subclass of plaintiffs described above is in fact a policy of insurance, and if so, whether said insurance is sold in violation of the provisions of the Alabama Mini Code which regulate the sale of insurance in conjunction with a consumer credit transaction; whether the extended warranty constitutes a charge incident to the extension of consumer credit; if the extended warranty constitutes a charge incident to the extension of consumer credit, whether the finance charge assessed in each said consumer loan agreement wherein an extended warranty was sold exceeds the maximum finance charge permitted by the Alabama Mini-Code; whether the defendants were under any obligation to disclose to the plaintiffs that the extended warranty could not be offered in conjunction with a consumer credit transaction; whether the defendants were under any obligation to disclose to the plaintiffs that said defendants could not require the purchase of said extended warranty as a condition to the extension of consumer credit.

3. Plaintiffs aver that a class action is superior to other available methods for the fair and efficient adjudication of the controversy because, inter alia: (a) The commonality of issue of law and fact, as well as the relatively small liability to each class member substantially diminishes the interest of members of the class in individually controlling the prosecution of separate actions; (b) many of the members of plaintiffs' class are unaware of their rights to prosecute and do not have the means or resources to secure legal assistance; (c) there has been little, if any,

litigation already commenced by members of the class to determine the questions presented; (d) it is desirable that the claims be concentrated in this forum due to the fact that the creditor has offices in Alabama which are located in Talladega County and that plaintiffs believe that many members of their class will reside in the Talladega County area, thus facilitating the procurement of additional evidence in this case and; (e) a class action can be managed without undue difficulty since the defendants have regularly committed the violations complained of herein, have used standardized forms in doing so, and are required to have records of their dealings with each member of the class.

COUNT I

4. Each plaintiff herein and the class of plaintiffs which the named plaintiffs represent has obtained a consumer loan in the State of Alabama from the defendant, Warehouse Home Furnishing Distributors Inc. d/b/a Farmers Furniture.

5. At the time of the execution of the consumer loan agreement, each plaintiff was required to purchase from the defendant, Warehouse Home Furnishing Distributors Inc. d/b/a Farmers Furniture a policy of Non-Filing Insurance. In addition to non-filing insurance, each member of a subclass defined in paragraph 1 above was required to a policy of Credit Property Insurance. In addition to non-filing insurance, each member of a subclass defined in paragraph 1 above was required to purchase an extended warranty purportedly issued by the defendant, Warehouse Home Furnishing Distributors Inc. d/b/a Farmers Furniture.

6. At the time of sale of each policy of non-filing insurance, each policy of Credit Property Insurance and each "extended warranty," the defendant, Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture

was prohibited from exempting from the finance charge the premiums for said non-filing insurance, the premium for said Credit Property Insurance and the charge for the "extended warranty" by reason of the provisions of Code of Alabama (1975) section 5-19-1 et seq. (hereinafter referred to as the Mini-Code) in the following respects:

a. that the Mini-Code only permits a creditor to exempt from the finance charge a premium for "insurance in lieu of perfecting a security interest in property" and that the said defendant's security interest is automatically perfected.

b. that the premium charged for non-filing insurance was not used to purchase a policy of "insurance in lieu of perfecting a security interest in property," but rather was divided between the creditor and the insurer, or between the creditor and another legal entity acting on the insurer's behalf, under a formula which compensates the creditor irrespective of whether its loss is caused by the failure to perfect a security interest in property.

c. that the Credit Property insurance was sold in an amount equal to the gross amount of the loan in violation of Regulation 93, promulgated by the Alabama State Department of Insurance.

d. that the Credit Property insurance was sold in an amount in excess of the replacement cost of the insured property, in violation of Regulation 93, promulgated by the Alabama State Department of Insurance.

e. that the "extended warranty" constitutes a policy of insurance, and is sold in violation of the provisions of the Alabama Mini-Code which regulate the sale of insurance in conjunction with the extension of consumer credit.

f. that purchase of the "extended warranty" was made a condition of the loan.

7. The premium for said non-filing insurance; the premium for said Credit Property Insurance and the charge

for said extended warranty constitute finance charges as that term is defined by Code of Alabama (1975) section 5-19-1. The addition of said finance charges to the disclosed finance charge in each consumer credit transaction results in a total finance charge in each transaction which exceeds the maximum amount permitted by the Alabama Mini-Code.

8. Pursuant to the provisions of Code of Alabama (1975) section 5-19-19, the plaintiffs have made written demand upon the said defendants to refund the finance charges in each consumer loan where credit property insurance or an extended warranty was imposed, and said defendants have refused to respond to said demand.

9. Said excess finance charges have been imposed in deliberate violation of the Alabama Mini-Code, or in reckless disregard thereof. Pursuant to the provisions of Code of Alabama (1975) section 5-19-19, each such consumer loan contract is void and the plaintiffs are entitled to a refund of all principal and all finance charges, together with a reasonable attorney's fee. Alternatively, pursuant to the provisions of said section, plaintiffs are entitled to a refund of twice the finance charge or ten times the excess charge, whichever is greater, together with a reasonable attorney's fee. Alternatively, pursuant to the provisions of said section, plaintiffs are entitled to a refund of the entire finance charge paid.

10. WHEREFORE, premises considered, plaintiffs pray for a judgment against the defendant, Warehouse Home Furnishing Distributors, Inc., under the allegations of Count I of this complaint, in a sum equal to the amount paid by each plaintiff to said defendant pursuant to said void consumer loan contracts, including principal, interest and excess charges together with a reasonable attorney's fee. Alternatively plaintiffs pray for a judgment against the said defendant in a sum equal to twice the

finance charge or ten times the excess charge, whichever is greater, together with a reasonable attorney's fee. Alternatively plaintiffs pray for a judgment against said defendant in a sum equal to the entire finance charge paid to said defendant.

COUNT II

11. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporate those allegations herein by reference.

12. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 4 above, all named and fictitious defendants represented to each said plaintiff that the premium assessed for "NON FILING INS." was used to purchase a policy of insurance in lieu of perfecting a security interest in property. Said representation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein.

13. The representations made by said defendants were false and the defendants knew they were false, or defendants misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the fee assessed for non-filing insurance did not in fact represent the premium for the purchase of a policy of insurance in lieu of perfecting a security interest in property, and said premium was not in fact used to purchase a policy of non-filing insurance, but rather was divided between the defendant, Warehouse Home Furnishing Distributors, Inc. and the insurance company, or between the said defendant and another legal entity acting on behalf of the insurance company, in a manner which is unrelated to losses associated with the failure to perfect a security interest in property. In reliance upon said rep-

resentations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "NON-FILING INS."

14. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for non-filing insurance and by being required to pay interest on said fee during the duration of the consumer loan agreement.

15. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count II, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT III

16. Plaintiffs reallege the allegations of paragraphs 4 and 5 above, and incorporate those allegations herein by reference.

17. On or about the date of execution of the consumer loan by each plaintiff in the class named above, the defendant, Warehouse Home Furnishing Distributors Inc. d/b/a Farmers Furniture, Richard McQueen, Albert Benjamin Sprouse, and all fictitious defendants were under an obligation to disclose to the plaintiffs all facts material to the execution of the consumer loan agreement. This obligation to disclose arose by reason of the superior knowledge of the said defendants concerning Alabama insurance and consumer finance law and by other facts and circumstances which are particular to these transactions. While under the foregoing duty to disclose, the said defendants concealed from each plaintiff the following facts:

a. That the fee assessed for non-filing insurance would not be used to purchase a policy of insurance in lieu of perfecting a security interest in property.

b. That the Credit Property Insurance was sold in an amount in excess of the replacement value of the insured property.

c. That the extended warranty was not a required feature of the consumer loan agreement.

d. That the extended warranty was actually a policy of insurance which the defendants were prohibited by law from offering in conjunction with the execution of a consumer loan agreement.

e. That the extended warranty duplicates the manufacturers' warranty covering the property.

f. That the extended warranty is worthless during the term of the corresponding manufacturers' warranty.

g. That the said consumer loan agreement contained excessive and undisclosed finance charges.

18. Said defendants concealed said facts from the plaintiffs knowingly and with the intention that the plaintiffs be deceived thereby.

19. As a proximate result of the deceit of the said defendants, plaintiffs were damaged by being induced to pay money to the said defendants as a premium for the said non-filing insurance; by being deprived of that portion of the credit property insurance premium which purchased insurance in excess of the replacement value of the insured property and by being induced to pay money to the said defendants as a premium for an extended warranty.

20. WHEREFORE, premises considered, plaintiffs pray for a judgment against the defendants named above, under the allegations of Count III, in a sum representing both compensatory and punitive damages in an amount

to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT IV

21. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporate those allegations herein by reference.

22. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 4 above, all named and fictitious defendants represented to each plaintiff that the premium assessed for credit property insurance was calculated in a manner which would provide insurance for the replacement cost of the collateral securing the consumer loan contract. This representation was made to each plaintiff in the language of the consumer loan contract executed by each said plaintiff and in the language of the credit property insurance certificate.

23. The representations were false and the defendants knew they were false, or the defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the credit property insurance premium was calculated on an amount in excess of any insurable interest in property and in excess of the replacement value of the collateral.

24. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the premium for credit property insurance which represents insurance in excess of the replacement value of the collateral.

25. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count IV, in a sum which represents both compensatory and punitive damages and

which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT V

26. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporate those allegations herein by reference.

27. On or about the date of the execution of each consumer loan by each plaintiff described in paragraph 4 above, all named and fictitious defendants represented to the said plaintiff that the purchase of said extended warranty would obligate the said creditor to keep the property covered by said warranty in repair for the term of said obligation. These representations were made in the language of the consumer loan agreement and the service warranty application executed by each plaintiff described above.

28. The representations were false and the defendants knew they were false, or the defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that the plaintiffs rely thereon. The representations were false in that the warranty sold by said defendants duplicates the manufacturers' warranty on the property covered by said warranty; that, by the terms of said warranty, the defendants are not obligated to perform until the manufacturers' warranty is exhausted; and that, for the term of the manufacturers' warranty on said property the warranty sold by the defendants is worthless.

29. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for an "extended warranty."

30. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defen-

dants, under the allegations of Count V, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT VI

31. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporate those allegations herein by reference.

32. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 4 above, all named and fictitious defendants conspired together to deprive each plaintiff of the premium assessed for "NON FILING INS" by representing to said plaintiff that the premium was used to purchase a policy of insurance in lieu of perfecting a security interest in property. Said representation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein.

33. The representations made by said defendants were false and the defendants knew they were false, or defendants misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the fee assessed for non-filing insurance did not in fact represent the premium for the purchase of a policy of insurance in lieu of perfecting a security interest in property, and said premium was not in fact used to purchase a policy of non-filing insurance, but rather was divided between the defendant, Warehouse Home Furnishing Distributors Inc. and the insurance company, or between the said defendant and another legal entity acting on behalf of the insurance company, in a manner which is unrelated to losses associated with the failure to perfect

a security interest in property. In reliance upon said representations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "NON-FILING INS."

34. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for non-filing insurance and by being required to pay interest on said fee during the duration of the consumer loan agreement.

35. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count VI, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT VII

36. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporate those allegations herein by reference.

37. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 4 above, all named and fictitious defendants conspired together to deprive each plaintiff of the premium for credit property insurance which represents insurance in excess of the replacement cost of the collateral by representing to each plaintiff that the premium assessed for credit property insurance was calculated in a manner which would provide insurance for the replacement cost of the collateral securing the consumer loan contract. This representation was made to each plaintiff in the language of the consumer loan contract executed by each said plaintiff and in the language of the credit property insurance certificate.

38. The representations were false and the defendants knew they were false, or the defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the credit property insurance premium was calculated on an amount in excess of any insurable interest in property and in excess of the replacement value of the collateral.

39. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the premium for credit property insurance which represents insurance in excess of the replacement value of the collateral.

40. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count VII, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT VIII

41. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporated those allegations herein by reference.

42. On or about the date of the execution of each consumer loan by each plaintiff described in paragraph 4 above, all named and fictitious defendants conspired together to deprive each plaintiff of the sum designated as "warranty" or "extended warranty" by representing to the said plaintiff that the purchase of said extended warranty would obligate the said creditor to keep the property covered by said warranty in repair during the term of said obligation. These representations were made in the language of the consumer loan agreement and the service

warranty application executed by each plaintiff described above.

43. The representations were false and the defendants knew they were false, or the defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that the plaintiffs rely thereon. The representations were false in that the warranty sold by said defendants duplicates the manufacturers' warranty on the property covered by said warranty; that, by the terms of said warranty, the defendants are not obligated to perform until the manufacturers' warranty is exhausted; and that, for the term of the manufacturers' warranty on said property the warranty sold by the defendants is worthless.

44. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for an "extended warranty."

45. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count VIII, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

/s/ Lloyd W. Gathings
Lloyd W. Gathings
Attorney for Plaintiffs

OF COUNSEL:
TAYLOR, GATHINGS & ROBERSON
2112 FIRST AVENUE NORTH
BIRMINGHAM, ALABAMA 35203

/s/ Harvey B. Campbell, Jr.
Harvey B. Campbell, Jr.
Attorney for Plaintiffs

OF COUNSEL:
CAMPBELL & CAMPBELL P.C.
P.O. DRAWER 756
TALLADEGA, ALABAMA 35160

/s/ Huel M. Love, Jr.
Huel M. Love, Jr.
Attorney for Plaintiffs

OF COUNSEL:
LOVE, LOVE & LOVE P.C.
P.O. BOX 517
TALLADEGA, ALABAMA 35160

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing instrument upon counsel of record for all parties by placing a copy in the United States Mail, first class postage prepaid and addressed as shown below. All service accomplished in the manner set out herein on the 6th day of July, 1994.

William Shelton Pritchard III
PRITCHARD, MCCALL & JONES
505 N. 20th St. Suite 800
Birmingham, AL. 35203-2605

B. Clark Carpenter
WOOTEN, THORNTON CARPENTER
OBRIEN & LAZENBY
P.O. Box 277
Talladega, AL 35160

/s/ Harvey B. Campbell, Jr.
Attorney for Plaintiff

APPENDIX I

IN THE CIRCUIT COURT OF
TALLADEGA COUNTY, ALABAMA

JACKIE E. WHITSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	CASE NUMBER
	)	CV-94-177
	)	
WAREHOUSE HOME FURNISHING	)	
DISTRIBUTORS INC. d/b/a	)	
FARMERS FURNITURE, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING CLASS CERTIFICATION

The plaintiffs to the above-captioned litigation having applied for an Order granting class certification, after due deliberation and consideration of the totality of the circumstances and the record, and for good cause shown, it is hereby ORDERED that:

1. Civil Action No. CV 94-177, styled *Jackie E. Whitson, et al. v. Warehouse Home Furnishings Distributors Inc. d/b/a Farmers Furniture, et al.*, is hereby certified as a class action pursuant to the Alabama Rules of Civil Procedure, Rule 23(b)(2). The class hereby certified consists of:

> All persons who have obtained a consumer loan from the defendant, Warehouse Home Furnishings Distributors, Inc. d/b/a Farmers Furniture, in the State of Alabama in conjunction with the purchase of items at one of the defendant's Ala-

> bama stores since May 1, 1986, and have been charged for non-filing insurance, credit life insurance, property insurance, accident and health insurance, or unemployment insurance.

The class *does not* include the following:

> (1) Any person who has previously settled his or her claims against any of the defendants herein and has entered into a legally binding settlement agreement or release, or has obtained a judgment against said Defendants, on any claims arising from the person being charged for non-filing insurance, credit life insurance, property insurance, accident and health insurance, or unemployment insurance; or (2) any person who is deceased at the time of the certification of the class described above.

2. Jackie E. Whitson, Aubrey J. Strickland, Jr., Robyn Gamble, and Rena Yates are designated as class representatives, and Lloyd W. Gathings II, Harvey B. Campbell, Jr., Ralph Gaines, and Huel Love, Jr. are designated as counsel for the class.

3. The Court makes the following findings: that the named plaintiffs and class counsel are adequate representatives of and for the Class, and that all requirements of Rules 23(a) and 23(b)(2) Alabama Rules of Civil Procedure are met; that the class is so numerous that the joinder of all members is impracticable; that class counsel are able and experienced and will adequately represent the class; that there are questions of law and fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; the named plaintiffs are adequate representatives of the class; and that the plaintiffs will fairly and adequately represent the interests of the class. The Court finds that maintenance of this action as a class action pursuant to Rule 23(b)(2) Ala-

bama Rules of Civil Procedure is superior to any other means of adjudicating the claims herein raised.

4. Pending final determination of this class action, the named plaintiffs and all members of the described class are hereby enjoined and prohibited from commencing or prosecuting any action, either directly, individually, representatively, or in any capacity, asserting any claims set forth in the complaint, as amended, filed in this case.

5. Defendant, Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture, shall provide to the plaintiffs within 45 days from the date of this order the names and last known addresses of all persons said Defendant's records indicate would fall within the above-described class.

6. Plaintiffs shall submit to the Court within 45 days from the date of this order a proposal on the manner in which class notification should be effected and a copy of the suggested notification.

DONE, ORDERED, ADJUDGED AND DECREED, this 18th day of November, 1994.

/s/ Jerry L. Fielding

Jerry L. Fielding
Circuit Court Judge

APPENDIX J

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

IN RE:		
KATHY ELLEN,	*	CASE NO. 94-40704
DEBTOR	*	CHAPTER 13

MOTION TO MODIFY CHAPTER 13 PLAN

Comes now the above named debtor and amends her Chapter 13 Plan as to the following, to-wit:

1. Debtor amends Section IV (8) of the plan, to show that a suit has been brought against Voyager Insurance Companies, et al or such insurance company that has sold debtor insurance in connection with a loan or financing a purchase of consumer goods. Debtor shall be allowed to bring any action for fraud, breach of contract, bad faith, truth-in-lending, Mini Code of Alabama violation, violation of Alabama Small Loan Act, concealed finance charges against the above in such state court or U.S. District Court, or such other court as she decided against any individual, insurance company that may have committed the above described violations. Debtor shall be allowed to be a class member of any class action in which she would otherwise be a member without waiving any of her rights by a confirmation of this Chapter 13 Plan.

2. Debtor further shows that she will notify this Court and the Chapter 13 Trustee of any and all developments in this cause of action as well as in other claims which may prosecute in the State Courts in violation of the above described action. This is not intended to avoid any provisions of Debtor's Chapter 13 Plan that requires

debtor to pay her net available income into her Chapter 13 Plan.

3. The remainder of the plan to remain the same as previously filed.

/s/ Harvey B. Campbell, Jr.

Harvey B. Campbell, Jr.
Attorney for Debtor
Campbell & Campbell, P.C.
400 South Court Square
Post Office Drawer 756
Talladega, AL 35160
(205) 761-1858

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing motion to Mavis Willingham, Trustee, P.O. Box 96, Anniston, AL 36202 and to the creditors on this the 25th day of September, 1994.

/s/ Harvey B. Campbell, Jr.

Harvey B. Campbell, Jr.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

IN RE:		
KATHY ELLEN,	*	CASE NO. 94-40704
DEBTOR	*	CHAPTER 13

MOTION TO AMEND ASSETS

Comes now the above named debtor and amends her Chapter 13 Schedule of Assets as to the following attached exhibit.

/s/ Harvey B. Campbell, Jr.

Harvey B. Campbell, Jr.
Attorney for Debtor
Campbell & Campbell, P.C.
400 South Court Square
Post Office Drawer 756
Talladega, AL 35160
(205) 761-1858

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing motion to Mavis Willingham, Trustee, P.O. Box 96, Anniston, AL 36202 on this the 26th day of September, 1994.

/s/ Harvey B. Campbell, Jr.

Harvey B. Campbell, Jr.

SCHEDULE B — PERSONAL PROPERTY

Type of Property	Description and Location of Property	Husb. Wife Joint or Comm.	Current Market Value of Debtor's Interests in Property, Without Deducting Any Secured Claim or Exemption
1. Cash on hand.	NONE	W	0.00
2. Checking, savings or other financial accounts, certificates of deposit, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.	checking, Metro Bank, Pell City, AL	W	0.00
3. Security deposits with public utilities, telephone companies, landlords, and others.	NONE		0.00

4. Household goods and furnishings, including audio, video, and computer equipment.	Satilte system	W	2,000.00
	air conditioner	W	1,200.00
	camcorder	W	1,400.00
	entertainment center, dinette set, stove, refrigerator, bunk beds, full bed, washer	W	1,200.00
	sofa	W	168.92
5. Books; pictures and other art objects; antiques; stamp, coin, record, tape, compact disc, and other collections or collectibles.	NONE		0.00
6. Wearing apparel.	clothing	W	150.00
7. Furs and jewelry.	jewelry	W	300.00
8. Firearms and sports, photographic, and other hobby equipment.	NONE		0.00

9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.	NONE	0.00
10. Annuities. Itemize and name each issuer.	NONE	0.00
11. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Itemize.	NONE	0.00
12. Stock and interests in incorporated and unincorporated businesses. Itemize.	NONE	0.00
13. Interests in partnerships or joint ventures. Itemize.	NONE	0.00

14. Government and corporate bonds and other negotiable and non-negotiable instruments.	NONE	0.00
15. Accounts receivable.	NONE	0.00
16. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.	NONE	0.00
17. Other liquidated debts owing debtor including tax refunds. Give details.	NONE	0.00
18. Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the	NONE	0.00

debtor other than those listed in Schedule of Real Property.		
19. Contingent and non-contingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.	NONE	0.00
20. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.	NONE	0.00
21. Patents, copyrights, and other intellectual	NONE	0.00

property. Give estimated value of each.			
22. Licenses, franchises, and other general intangibles. Give particulars.	NONE		0.00
23. Automobiles, trucks, trailers, and other vehicles and accessories.	1969 Camaro (son has possession of it)	W	1,738.02
	1991 Camaro	W	9,144.00
	mobile home	W	11,000.00
24. Boats, motors, and accessories.	NONE		0.00
25. Aircraft and accessories.	NONE		0.00
26. Office equipment, furnishings, and supplies.	NONE		0.00
27. Machinery, fixtures, equipment, and supplies.	NONE		0.00

28. Inventory.	NONE		0.00
29. Animals.	NONE		0.00
30. Crops-growing or harvested. Give particulars.	NONE		0.00
31. Farming equipment and implements.	NONE		0.00
32. Farm supplies, chemicals, and feed.	NONE		0.00
33. Other personal property of any kind not already listed. Itemize.	Ellen vs. Bruno's (worker's compensation)	W	unknown
	Ellen vs. Heilig Meyers	W	unknown
	Ellen vs. Voyager Insurance Company, et al.	W	unknown
		Total	28,300.94

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

KATHY ANN ELLEN; JACKIE E. WHITSON, et al.,	*	
Plaintiffs,	*	
v.	*	
VOYAGER INSURANCE COMPANIES; VOYAGER GUARANTY INSURANCE COMPANY; VOYAGER LIFE & HEALTH INSURANCE COMPANY; VOYAGER LIFE INSURANCE COMPANY; VOYAGER GROUP, INC.; VOYAGER PROPERTY & CASUALTY INSURANCE COMPANY; ALBERT BENJAMIN SPROUSE, JR.; et al.,	*	CIVIL ACTION NO. 94-0525-BH-C
Defendants.	*	

NOTICE OF REMOVAL

COME NOW the Defendants, Voyager Insurance Companies, Voyager Guaranty Insurance Company, Voyager Life & Health Insurance Company, Voyager Life Insurance Company, Voyager Group, Inc., Voyager Property & Casualty Insurance Company, and Albert Benjamin

Sprouse, Jr., and file this Notice of Removal pursuant to 28 U.S.C. § 1441 and § 1332, and for grounds says as follows:

1. On June 8. 1994, the Plaintiffs filed a Complaint against the Defendants, Voyager Insurance Companies, Voyager Guaranty Insurance Company, Voyager Life & Health Insurance Company, Voyager Life Insurance Company, Voyager Group, Inc., Voyager Property & Casualty Insurance Company (collectively "Voyager Defendants"), and Albert Benjamin Sprouse, Jr. ("Sprouse") in the Circuit Court of Marengo County, Alabama, case number CV 94-069, a copy of which is attached as Exhibit "A".

2. The Voyager Defendants were served with the Summons and Complaint on June 20, 1994. Defendant Sprouse was served with the Summons and Complaint on June 18, 1994. Less than thirty days have elapsed since the Defendants were served with the Complaint filed in the Circuit Court of Marengo County, Alabama.

3. Upon information and belief, at the time of the commencement of this action all Plaintiffs were and now are resident citizens of the State of Alabama, and all living in Alabama, as evidenced by Plaintiffs' Complaint attached as Exhibit "A".

4. There is no legal entity named Voyager Insurance Companies.

5. Defendant Voyager Guaranty Insurance Company is a Missouri corporation with its principal place of business in Texas.

6. Defendant Voyager Life & Health Insurance Company is a Georgia corporation with its principal place of business in Texas.

7. Defendant Voyager Life Insurance Company is a Georgia corporation with its principal place of business in Texas.

8. Defendant Voyager Group, Inc. is a Florida corporation with its principal place of business in Texas.

9. Defendant Voyager Property & Casualty Insurance Company is a South Carolina corporation with its principal place of business in Texas.

10. None of the Voyager Defendants, at the time of the commencement of this action or at any time, were incorporated or had a principal place of business in Alabama.

11. Defendant Sprouse is an individual Alabama resident fraudulently joined as a Defendant solely to defeat diversity jurisdiction, as more fully set forth in this Notice and the Exhibits attached.

12. This Court has original jurisdiction over the claims by the Plaintiffs under 28 U.S.C. § 1332 in that such claims present a civil action between parties of diverse state citizenship and the amount in controversy exceeds $50,000.00, exclusive of interest and costs.

13. The Plaintiffs have requested relief for compensatory and punitive damages. While no specific amount is requested by the Plaintiffs, the amount in controversy between the parties exceeds the sum and value of $50,000.00, exclusive of interest and costs, as more clearly appears by the Plaintiffs' Complaint attached as Exhibit "A".

14. The Defendant Albert Benjamin Sprouse, Jr. is employed by Warehouse Furnishing Distributor, Inc. d/b/a Farmers Furniture Company ("Farmers Furniture") in Talladega, Alabama. His only participation in a consumer transaction is in his capacity as an employee of Farmers Furniture. Neither Defendant Sprouse or his employer have entered into a consumer transaction with the Plaintiff, Kathy Ann Ellen. (See the Exhibit of Albert Benjamin Sprouse, Jr. attached as Exhibit "B" and the Affidavit of corporate credit administrator for Farmers

Furniture attached as Exhibit "C", both of which are made a part of this removal petition as though fully set out herein).

15. The Complaint alleges that the misrepresentation made to them were made in "the language of the consumer loan contract executed by each Plaintiff herein." (Paragraphs 5, 9, 17, and 21 of the Complaint) and "in the language of the credit property insurance certificate" (Paragraphs 17, 21 of the Complaint).

Accepting these allegations as true, any representations alleged to have been made by Defendant Sprouse would have been representations made within the line and scope of his employment by Farmers Furniture through the use of their forms.

The acts of a corporation's agents and employees made while acting within the line and scope of such employee's employment are acts of the corporation (*Phillips v. Amoco Oil Company*, 614 F. Supp. 694, 703 (N.D. Ala. 1985)).

Even if these allegations of the complaint are true, they fail to state a cause of action against Defendant Sprouse.

16. On April 23, 1994, Plaintiff, Jackie E. Whitson sued Defendant Sprouse in a state court action styled *Jackie E. Whitson v. Farmers Furniture of Alabama, Inc.; Richard McQueen; and Albert Benjamin Sprouse, Jr., et al.*, presently pending in the Circuit Court of Talladega County, Alabama, as case number CV 94-177. A copy of that Complaint, and responsive pleadings, are attached as Exhibit "D". This Complaint reflects the same cause of action and claims against Defendant Sprouse as are alleged in the instant case. Two of the attorneys representing Whitson in this action represent Whitson in the Talladega County action.

Any alleged claim by Plaintiff Whitson against Defendant Sprouse is already being litigated in this prior lawsuit pending in Talladega County. The only benefit of naming Sprouse again as a Defendant in this lawsuit is to defeat diversity jurisdiction.

17. Plaintiff, Kathy Ann Ellen submitted herself and her assets to the jurisdiction of the Federal Court by filing her now pending Chapter 13 Bankruptcy Petition on April 5, 1994 in the United States Bankruptcy Court, Northern District of Alabama, Eastern Division, case number 94-40704. That petition does not list Farmers Furniture as a creditor.

18. In the absence of an allegation of a valid cause of action against the Defendant Sprouse, he is fraudulently joined as a Defendant and is due to be ignored for diversity jurisdictional purposes. *Mask v. Chrysler Corporation,* 825 F. Supp. 285 (N.D. Ala. 1993); *Covington v. Indemnity Insurance Company of North America,* 251 F. 2d 930 (5th Cir. 1958) *cert. denied,* 357 U.S. 921.

19. As a fraudulently joined Defendant, Sprouse is not a real party Defendant in this action, and this Court has jurisdiction of this case by virtue of diversity of citizenship of the real parties in interest under 28 U.S.C. § 1332 and § 1441.

20. Contemporaneous with the filing of this Notice of Removal, written notice has been served upon the Plaintiffs through their counsel of record, and a copy of this Notice of Removal has been filed with the Clerk of the Circuit Court of Marengo County, Alabama.

/s/ W. B. Hairston, Jr.

William B. Hairston, Jr.
420-92-8666

/s/ Judith D. Holt

Judith D. Holt
423-90-2002
Attorneys for Defendants
Voyager Insurance Companies
Voyager Guaranty Insurance Company
Voyager Life & Health Insurance Company
Voyager Group, Inc.
Voyager Life Insurance Company
Voyager Property & Casualty Insurance Company

OF COUNSEL:
ENGEL, HAIRSTON & JOHANSON, P.C.
109 North 20th Street
P.O. Box 370027
Birmingham, AL 35237
(205) 328-4600

/s/ William Pritchard III

William Pritchard III
423-60-4346

/s/ James G. Henderson

James G. Henderson
Attorneys for Defendant,
Albert Benjamin Sprouse, Jr.

OF COUNSEL:
PRITCHARD, McCALL & JONES
800 Financial Center
505 North 20th Street, Suite 800
Birmingham, AL 35203-2605
(205) 328-7953

/s/ Clark B. Carpenter Jr By:wsh

Clark B. Carpenter, Jr.
416-72-3262
Attorney for Defendant
Albert Benjamin Sprouse, Jr.

OF COUNSEL:
WOOTEN, THORNTON, CARPENTER,
O'BRIEN & LAZENBY
P.O. Box 277
Talladega, AL 35160
(205) 362-0081

CERTIFICATE OF SERVICE

I certify that I have served a copy of the above and foregoing on all attorneys of record by placing a copy of same in the United States mail, properly addressed, and first class postage prepaid on this 11th day of July, 1994.

/s/ Judith D. Holt

Judith D. Holt

Lloyd W. Gathings
TAYLOR, GATHINGS & ROBERSON
2112 First Ave. North
Birmingham, AL 35203

Harvey Campbell Jr.
CAMPBELL & CAMPBELL
P.O. Drawer 756
Talladega, AL 35160

Huel M. Love Jr.
LOVE, LOVE & LOVE, P.C.
P.O. Box 517
Talladega, AL 35160

IN THE CIRCUIT COURT OF
MARENGO COUNTY, ALABAMA

KATHY ANN ELLEN; JACKIE E. WHITSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
VS.	)	CASE NUMBER CV-94-069
VOYAGER INSURANCE COMPANIES, a corporation; VOYAGER GUARANTY INSURANCE COMPANY, a corporation; VOYAGER LIFE AND HEALTH INSURANCE COMPANY, a corporation; VOYAGER LIFE INSURANCE COMPANY, a corporation; VOYAGER GROUP, INC., a corporation; VOYAGER PROPERTY AND CASUALTY INSURANCE COMPANY, a corporation; ALBERT BENJAMIN SPROUSE, JR.; No. 1 whether singular or plural, that entity or those entities who or which issued the policies of insurance which are the basis of this complaint; No. 2, whether singular or plural, that entity or those entities, who or which extended consumer credit to the plaintiffs or assisted in the extension of consumer credit to the plaintiffs on the occasions made the basis of this complaint; No. 3,	)	

whether singular or plural, that entity or those entities, who or which received any sum of money from any source whatsoever resulting from the execution of the consumer loan agreements which are the subject of this litigation; No. 4, whether singular or plural, that entity or those entities, who or which received money from any source whatsoever resulting from the sale to plaintiffs of the policies of insurance which are the subject of this litigation; No. 5, whether singular or plural, that entity or those entities, doing business as VOYAGER INSURANCE COMPANIES; No. 6, whether singular or plural, that entity or those entities, who or which provided any services with regard to the insurance policies purchased by the plaintiffs; No. 7, whether singular or plural, that entity or those entities, who or which is the successor in interest for any named or fictitious party defendants; No. 8, whether singular or plural, that entity or those entities, who or which engaged in a pattern or practice of illegal or wrongful conduct in order to sell similar policies of insurance providing similar benefits to policyholders similarly situated to the plaintiffs; No. 9, whether singular or plural, that entity or those entities, who or

which engaged in a scheme, artifice, combination or conspiracy to defraud the plaintiffs and similar policyholders in order to obtain premiums from the sale of an insurance product such as the one made the basis of this suit and/or deprived such policyholders of the benefits of an insurance product such as the one made the basis of this suit. Plaintiffs aver that the identity of the fictitious party defendants herein is otherwise unknown to plaintiffs at this time or, if their names are known to plaintiffs their identity as proper party defendants is not known to plaintiffs at this time, and their true names will be substituted by amendment when the aforesaid lacking knowledge is ascertained,

Defendants.

SUMMONS

This service by certified mail of this Summons is initiated upon the written request of plaintiffs' attorney pursuant to the Alabama Rules of Civil Procedure.

NOTICE TO: VOYAGER INSURANCE COMPANIES, a corporation; VOYAGER GUARANTY INSURANCE COMPANY, a corporation; VOYAGER LIFE AND HEALTH INSURANCE COMPANY, a corporation; VOYAGER LIFE INSURANCE COMPANY, a corporation; VOYAGER GROUP, INC., a corporation; VOYAGER

PROPERTY AND CASUALTY INSURANCE COMPANY, a corporation; ALBERT BENJAMIN SPROUSE, JR.; No. 1 whether singular or plural, that entity or those entities who or which issued the policies of insurance which are the basis of this complaint; No. 2, whether singular or plural, that entity or those entities, who or which extended consumer credit to the plaintiffs or assisted in the extension of consumer credit to the plaintiffs on the occasions made the basis of this complaint; No. 3, whether singular or plural, that entity or those entities, who or which received any sum of money from any source whatsoever resulting from the execution of the consumer loan agreements which are the subject of this litigation; No. 4, whether singular or plural, that entity or those entities, who or which received money from any source whatsoever resulting from the sale to plaintiffs of the policies of insurance which are the subject of this litigation; No. 5, whether singular or plural, that entity or those entities, doing business as VOYAGER INSURANCE COMPANIES; No. 6, whether singular or plural, that entity or those entities, who or which provided any services with regard to the insurance policies purchased by the plaintiffs; No. 7, whether singular or plural, that entity or those entities, who or which is the successor in interest for any named or fictitious party defendants; No. 8, whether singular or plural, that entity or those entities, who or which engaged in a pattern or practice of illegal or wrongful conduct in order to sell similar policies of insurance providing similar benefits to policyholders similarly situated to the plaintiffs; No. 9, whether singular or plural, that entity or those entities, who or which engaged in a scheme, artifice, combination or conspiracy to defraud the plaintiffs and similar policyholders in order to obtain premiums from the sale of an insurance product such as the one made the basis of this suit and/or deprived such policyholders of the benefits of an insur-

ance product such as the one made the basis of this suit. Plaintiffs aver that the identity of the fictitious party defendants herein is otherwise unknown to plaintiffs at this time or, if their names are known to plaintiffs their identity as proper party defendants is not known to plaintiffs at this time, and their true names will be substituted by amendment when the aforesaid lacking knowledge is ascertained,

Defendants.

The Complaint which is attached to this Summons is important and you must take immediate action to protect your rights. You are required to mail or hand deliver a copy of a written Answer, either admitting or denying each allegation in the Complaint to:

LLOYD W. GATHINGS, ESQ.
TAYLOR, GATHINGS & ROBERSON
2112 FIRST AVENUE NORTH
BIRMINGHAM, ALABAMA 35203

THIS ANSWER MUST BE MAILED OR DELIVERED WITHIN THIRTY (30) DAYS FROM THE DATE OF DELIVERY OF THIS SUMMONS AND COMPLAINT AS EVIDENCED BY THE RETURN RECEIPT, OR A JUDGMENT BY DEFAULT MAY BE ENTERED AGAINST YOU FOR THE MONEY OR OTHER THINGS DEMANDED IN THE COMPLAINT. You must also file the original of your Answer with the Clerk of this Court within a reasonable time afterward.

Dated:_____ /s/ Dewaine Sealy
CLERK OF CIRCUIT COURT

IN THE CIRCUIT COURT OF
MARENGO COUNTY, ALABAMA

KATHY ANN ELLEN; JACKIE E. WHITSON, on behalf of themselves and all others similarly situated,	)
Plaintiffs,	)
VS.	) CASE NUMBER) CV-94-069
VOYAGER INSURANCE COMPANIES, a corporation; VOYAGER GUARANTY INSURANCE COMPANY, a corporation; VOYAGER LIFE AND HEALTH INSURANCE COMPANY, a corporation; VOYAGER LIFE INSURANCE COMPANY, a corporation; VOYAGER GROUP, INC., a corporation; VOYAGER PROPERTY AND CASUALTY INSURANCE COMPANY, a corporation; ALBERT BENJAMIN SPROUSE, JR.; No. 1 whether singluar or plural, that entity or those entities who or which issued the policies of insurance which are the basis of this complaint; No. 2, whether singular or plural, that entity or those entities, who or which extended consumer credit to the plaintiffs or assisted in the extension of consumer credit to the plaintiffs on the occasions made the basis of this complaint; No. 3,	)

whether singular or plural, that entity or those entities, who or which received any sum of money from any source whatsoever resulting from the execution of the consumer loan agreements which are the subject of this litigation; No. 4, whether singular or plural, that entity or those entities, who or which received money from any source whatsoever resulting from the sale to plaintiffs of the policies of insurance which are the subject of this litigation; No. 5, whether singular or plural, that entity or those entities, doing business as VOYAGER INSURANCE COMPANIES; No. 6, whether singular or plural, that entity or those entities, who or which provided any services with regard to the insurance policies purchased by the plaintiffs; No. 7, whether singular or plural, that entity or those entities, who or which is the successor in interest for any named or fictitious party defendants; No. 8, whether singular or plural, that entity or those entities, who or which engaged in a pattern or practice of illegal or wrongful conduct in order to sell similar policies of insurance providing similar benefits to policyholders similarly situated to the plaintiffs; No. 9, whether singular or plural, that entity or those entities, who or

which engaged in a scheme, artifice, combination or conspiracy to defraud the plaintiffs and similar policyholders in order to obtain premiums from the sale of an insurance product such as the one made the basis of this suit and/or deprived such policyholders of the benefits of an insurance product such as the one made the basis of this suit. Plaintiffs aver that the identity of the fictitious party defendants herein is otherwise unknown to plaintiffs at this time or, if their names are known to plaintiffs their identity as proper party defendants is not known to plaintiffs at this time, and their true names will be substituted by amendment when the aforesaid lacking knowledge is ascertained,

Defendants.

COMPLAINT

1. Plaintiffs bring this action on behalf of themselves and all members of a class composed of those individuals who, during the course of executing a consumer loan agreement in Alabama, have purchased a policy of Credit Property Insurance and/or a policy of Non-Filing Insurance issued and/or serviced by the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; and

Albert Benjamin Sprouse, Jr. Plaintiffs aver that the class is so numerous that joinder of all members is impracticable. The exact size of plaintiffs' class is not known, but the size of the class and the identification of its members is subject to precise determination through information within the exclusive control of the defendants. Plaintiffs aver that there are questions of law and fact common to the class as set out in the various counts of the complaint hereinafter. Plaintiffs further aver that their claims as representatives of the class are typical of the claims of the class. Plaintiffs further aver that in their representative capacity they will fairly and adequately protect the interests of the class.

2. Plaintiffs aver that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. The questions of law or fact which are common to the plaintiffs' class include inter alia; whether defendants misrepresented to each plaintiff that the premium assessed for non-filing insurance was used to purchase a policy of insurance in lieu of perfecting a security interest in property; whether defendants conspired together with retailers to deprive each plaintiff of the premium assessed for non-filing insurance by representing to said plaintiff that the premium was used to purchase a policy of insurance in lieu of perfecting a security interest in property; whether defendants wrongfully concealed from plaintiffs that the fee assessed for non-filing insurance would not be used to purchase a policy of insurance in lieu of perfecting a security interest in property, that the credit property insurance was sold in an amount in excess of the replacement value of the insured property, and that the said consumer loan agreement contained excessive and undisclosed finance charges; whether defendants misrepresented to each plaintiff that the purchase of credit property insurance in an amount equal to the total of pay-

ments of each loan was necessary; and whether defendants conspired together to deprive each plaintiff of the premium assessed for credit property insurance by misrepresenting to said plaintiff that the purchase of credit property insurance in an amount equal to the total of payments of each loan was necessary.

3. Plaintiffs aver that a class action is superior to other available methods for the fair and efficient adjudication of the controversy because, inter alia: (a) The commonality of issue of law and fact, as well as the relatively small liability to each class member substantially diminishes the interest of members of the class in individually controlling the prosecution of separate actions; (b) many of the members of plaintiffs' class are unaware of their rights to prosecute and do not have the means or resources to secure legal assistance; (c) there has been little, if any, litigation already commenced by members of the class to determine the questions presented; (d) it is desirable that the claims be concentrated in this forum and; (e) a class action can be managed without undue difficulty since the defendants have regularly committed the violations complained of herein, have used standardized forms in doing so, and are required to have records of their dealings with each member of the class.

COUNT I

4. Plaintiffs reallege the allegations of paragraph 1 and incorporate those allegations herein by reference.

5. On or about the date of execution of each consumer contract by each plaintiff described in paragraph 1 above, the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; Albert Benjamin Sprouse,

Jr.; and all fictitious defendants, represented to each plaintiff that the premium assessed for non-filing insurance was used to purchase a policy of insurance in lieu of perfecting a security interest in property. Said misrepresentation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein.

6. The representations made by said defendants were false and the defendants knew they were false, or defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the fee assessed for non-filing insurance did not in fact represent the premium for the purchase of a policy of insurance in lieu of perfecting a security interest in property, and said premium was not in fact used to purchase a policy of "non-filing insurance". In reliance upon said representations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "non-filing insurance".

7. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for non-filing insurance.

WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count I, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT II

8. Plaintiffs reallege the allegations of paragraph 1, and incorporate those allegations herein by reference.

9. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 1 above, the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; Albert Benjamin Sprouse, Jr.; and all fictitious defendants, conspired together with retailers to deprive each plaintiff of the premium assessed for "non-filing insurance" by representing to said plaintiff that the premium was used to purchase a policy of insurance in lieu of perfecting a security interest in property. Said representation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein.

10. The representations made by said defendants were false and the defendants knew they were false, or defendants recklessly misrepresented the facts or the defendants misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the fee assessed for non-filing insurance did not in fact represent the premium for the purchase of a policy of insurance in lieu of perfecting a security interest in property, and said premium was not in fact used to purchase a policy of non-filing insurance. In reliance upon said representations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "non-filing insurance".

11. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for non-filing insurance.

WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count II, in a sum which

represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT III

12. Plaintiffs reallege the allegations of paragraph 1, and incorporate those allegations herein by reference.

13. On or about the date of execution of each consumer loan by each plaintiff in the class named above, the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; Albert Benjamin Sprouse, Jr.; and all fictitious defendants were under an obligation to disclose to the plaintiffs all facts material to the execution of the consumer loan agreements and the insurance policies sold at the time the consumer loan agreements were entered into. This obligation to disclose arose by reason of the superior knowledge of the said defendants concerning Alabama insurance and consumer finance law and by the particular facts and circumstances of these type transactions. While under the foregoing duty to disclose, the said defendants concealed from each plaintiff the following facts:

a. That the fee assessed for "non-filing insurance" would not be used to purchase a policy of insurance in lieu of perfecting a security interest in property;

b. That the Credit Property Insurance was sold in an amount in excess of the replacement value of the insured property;

c. That the said consumer loan agreement contained excessive and undisclosed finance charges.

14. Said defendants concealed said facts from the plaintiffs knowingly and with the intention that the plaintiffs be deceived thereby.

15. As a proximate result of the deceit of the said defendants, plaintiffs were damaged by being induced to pay money to the said defendants for the purchase of said insurance.

WHEREFORE, premises considered, plaintiffs pray for a judgment against the defendants named above, under the allegations of Count III, in a sum representing both compensatory and punitive damages in an amount to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT IV

16. Plaintiffs reallege the allegations of paragraph 1, and incorporate those allegations herein by reference.

17. On or about the date of execution of each consumer contract by each plaintiff described in paragraph 1 above, the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; Albert Benjamin Sprouse, Jr.; and all fictitious defendants, represented to each plaintiff that the purchase of credit property insurance in an amount equal to the "total of payments" of each loan was necessary. Said misrepresentation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein and in the language of the credit property insurance certificate.

18. The representations made by said defendants were false and the defendants knew they were false, or defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention

that plaintiffs rely upon them. The representations were false in that the credit property insurance, which was sold in an amount in excess of any insurable interest and in excess of the replacement value of the collateral, was not necessary and was sold in an unlawful amount. In reliance upon said representations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "property insurance premium".

19. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for "property insurance premiums".

WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count IV, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT V

20. Plaintiffs reallege the allegations of paragraph 1, and incorporate those allegations herein by reference.

21. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 1 above, the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; Voyager Property and Casualty Insurance Company; Albert Benjamin Sprouse, Jr.; and all fictitious defendants, conspired together to deprive each plaintiff of the premium assessed for credit property insurance by representing to said plaintiff that the purchase of credit property insurance in an amount equal to the "total of payments" of each loan

was necessary. Said representation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein and in the language of the credit property insurance certificate.

22. The representations made by said defendants were false and the defendants knew they were false, or defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the credit property insurance, which was sold in an amount in excess of any insurable interest and in excess of the replacement value of the collateral, was not necessary and was sold in an unlawful amount. In reliance upon said representations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "property insurance premium".

23. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for "property insurance premiums".

WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count V, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

/s/ Lloyd W. Gathings

Lloyd W. Gathings
Attorney for Plaintiffs

OF COUNSEL:
Taylor, Gathings & Roberson
2112 First Avenue North
Birmingham, AL 35203
(205) 323-3300

/s/ Harvey B. Campbell, Jr.
Harvey B. Campbell, Jr.
Attorney for Plaintiffs

OF COUNSEL:
Campbell & Campbell
Post Office Drawer 756
Talladega, AL 35160
(205) 761-1858

/s/ Huel M. Love, Jr.
Huel M. Love, Jr.
Attorney for Plaintiffs

OF COUNSEL:
Love, Love & Love, P.C.
Post Office Box 517
Talladega, AL 35160
(205) 362-6670

PLAINTIFFS DEMAND A TRIAL BY STRUCK JURY.

/s/ Lloyd W. Gathings
Lloyd W. Gathings

PLAINTIFFS' ADDRESSES
Kathy Ann Ellen
Rt. 2, Box 3017
Pell City, Alabama 35125

Jackie E. Whitson
144 A Northwood Apt.
Talladega, Alabama 35160

DEFENDANTS TO BE SERVED AS FOLLOWS:

By Certified Mail:

Voyager Insurance Companies
P.O. Box 2918
Jacksonville, Florida 32203

Voyager Guaranty Insurance Company
P.O. Box 901045
Fort Worth, Texas 76101

Voyager Life and Health Insurance Company
60 Executive Park South, Suite 300
Atlanta, Georgia 30329

Voyager Life Insurance Company
P.O. Box 901045
Fort Worth, Texas 76101

Voyager Group, Inc.
P.O. Box 901045
Fort Worth, Texas 76101

Voyager Property and Casualty Insurance Company
110 West 7th St.
Fort Worth, Texas 76102

Albert Benjamin Sprouse, Jr.
715 East Battle Street
Talladega, Alabama 35160

IN THE CIRCUIT COURT FOR
MARENGO COUNTY, ALABAMA

KATHY ANN ELLEN; JACKIE E. WHITSON, et al.	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	CASE NUMBER
	)	CV-94-069
VOYAGER INSURANCE COMPANIES, et al.	)	
	)	
Defendants.	)	
	)	

PLAINTIFFS FIRST INTERROGATORIES AND REQUEST FOR PRODUCTION TO DEFENDANTS

Come now the plaintiffs in the above-styled cause and request that the defendants, VOYAGER INSURANCE COMPANIES; VOYAGER GUARANTY INSURANCE COMPANY; VOYAGER LIFE AND HEALTH INSURANCE COMPANY; VOYAGER LIFE INSURANCE COMPANY; VOYAGER GROUP, INC.; and VOYAGER PROPERTY AND CASUALTY INSURANCE COMPANY, answer the following interrogatories and requests for production separately and severally within the time required by the Alabama Rules of Civil Procedure. In addition, plaintiffs request that the defendants attach a copy of each and every document referred to in any of the interrogatories or in defendants' responses thereto or that defendants state the date and time that said documents will be produced for inspection and copying at the offices of plaintiffs' attorney.

NOTE: These interrogatories shall be deemed continuing, so as to require supplemental answers upon receipt

of additional information by this defendant or this defendant's attorney subsequent to your original response. Such supplemental answers are to be filed and served upon counsel for plaintiffs within thirty (30) days from receipt of such additional information but not later than the time of the trial of this case.

1. State the name, address, title and job duties of the person answering these interrogatories and the place where these interrogatoriers were answered.

2. State the name, address and job title of each person who was contacted in answering these interrogatories or who provided information relevant to the answering of the interrogatories and the proper designation of each book, document or record which was searched in answering the interrogatories.

3. Is this defendant's name correctly stated in the complaint on file in this cause? If not, state the correct way that this defendant should be designated as a party defendant in an action of law:

(a) At the time of the conduct complained of in the complaint

(b) At the present time.

4. State the general corporate history of this defendant from the date of incorporation to the present, including the date and place of incorporation, date you first qualified to do business in Alabama, whether or not you continuously carried on business in Alabama since that date, and the specific or primary business engaged in by this defendant.

5. Please state whether this defendant is a subsidiary, parent corporation or sister corporation to another corporation. If so, give complete details as to the other corporation's state of incorporation, address of its principal place of business and registered office, date of incorporation, and the specific or primary business engaged in

by that corporation. Additionally, state whether the corporation is qualified to do business in the State of Alabama, and whether it has continuously carried on business in Alabama since the date of qualification.

6. List the states that this defendant is currently registered to do business in and the types of insurance policies this defendant is registered to sell in each such state.

7. Produce copies of all underwriting manuals, sales manuals, written underwriting procedures, written sales procedures, claims manuals, written claims procedures and/or any other documents setting forth policies or procedures relating to this defendant's credit property policies and/or non-filing insurance policies dated at any time from January 1, 1985 to the present date.

8. When did this defendant first begin writing credit property policies and/or non-filing insurance policies with regard to consumer goods sold in the State of Alabama?

9. Produce a copy of all agreements, contracts and correspondence between this defendant and all retailers in Alabama relating in any manner whatsoever to credit property insurance and/or non-filing insurance sold at the time of financing of consumer goods by any retailer in Alabama.

10. Describe in detail the different types of losses for which claims were submitted to this defendant by retailers in Alabama with regard to non-filing insurance and credit property insurance, from the time this defendant started selling insurance to the present date.

11. Produce a copy of all claims forms, claims files and any other documents relating to claims filed by any and all retailers in Alabama on any policy of credit property insurance and/or non-filing insurance underwritten by this defendant.

12. State the name, address and date of sale for each customer within the state of Alabama who has been sold a policy of credit property insurance and/or non-filing insurance of this defendant.

13. State the name and address of all retailers in the State of Alabama who have had at any time an employee who was a licensed agent of this defendant, giving the inclusive dates that such employees were licensed.

14. State the name and address of all retailers in the State of Alabama that this defendant has sold policies of insurance to their customers in conjunction with the sale of consumer goods by said retailers, giving the inclusive dates of such sales.

15. Has any other entity been involved in any manner whatsoever with the sale or servicing of credit property insurance and/or non-filing insurance sold by this defendant to customers of retailers in Alabama, other than the retailers themselves and the other defendants in this lawsuit?

A. If so, state the name and address of each such entity and describe in detail the services performed by each such entity.

16. Describe and explain in detail each and every business relationship or business dealing between this defendant and all other defendants to this lawsuit relating in any manner to the writing, sales, servicing, claims management, underwriting and/or any other aspect of the non-filing insurance policies and/or credit property insurance policies sold by any of the defendants in the State of Alabama from January 1, 1985 to the present date.

17. State the name and address of all expert witnesses this defendant intends to call to testify at the trial of this case and give Rule 26(b)(4) ARCP information for each.

/s/ Lloyd W. Gathings
Lloyd W. Gathings
Attorney for Plaintiffs

OF COUNSEL:
TAYLOR, GATHINGS & ROBERSON
2112 1st Avenue North
Birmingham, Alabama 35203
(205) 323-3300

SERVE ON ALL DEFENDANTS ALONG WITH SUMMONS & COMPLAINT IN THIS MATTER.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

KATHY ANN ELLEN;	*	
JACKIE E. WHITSON, et al.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	CASE NO. _____
VOYAGER INSURANCE	*	
COMPANIES; VOYAGER	*	
GUARANTY INSURANCE	*	
COMPANY; VOYAGER LIFE &	*	
HEALTH INSURANCE	*	
COMPANY; VOYAGER LIFE	*	
INSURANCE COMPANY;	*	
VOYAGER GROUP, INC.;	*	
VOYAGER PROPERTY &	*	
CASUALTY INSURANCE	*	
COMPANY; ALBERT	*	
BENJAMIN SPROUSE, JR.; et al.,	*	
	*	
Defendants.	*	
	*	

MEMORANDUM IN SUPPORT OF REMOVAL.

The Defendants file this Memorandum in Support of their Notice of Removal.

FACTS:

On June 8, 1994, the Plaintiffs filed a Complaint against the Defendants, Voyager Insurance Companies,

Voyager Guaranty Insurance Company, Voyager Life & Health Insurance Company, Voyager Life Insurance Company, Voyager Group, Inc., Voyager Property & Casualty Insurance Company (collectively "Voyager Defendants"), and Albert Benjamin Sprouse, Jr. ("Sprouse") in the Circuit Court of Marengo County, Alabama, case number CV 94-069.

None of the Voyager Defendants, at the time of the commencement of this action or at any time, were incorporated or had a principal place of business in Alabama. Defendant Sprouse is an individual and is an Alabama resident.

Defendant Sprouse is an employee and agent of Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture Company ("Farmers Furniture"). He has had no contact or business dealings with Plaintiff Kathy Ann Ellen. A review of the business records of Farmers Furniture reflects that Plaintiff Kathy Ann Ellen is not a customer nor has she had any dealings or financial transactions with Farmers Furniture.

Previously on April 23, 1994, Plaintiff Jackie E. Whitson sued Defendant Sprouse in another case entitled *Jackie E. Whitson v. Farmers Furniture of Alabama, Inc.; Richard Queen; and Albert Benjamin Sprouse, Jr., et al.*, presently pending in the Circuit Court of Talladega County, Alabama, case number CV 94-177.

Plaintiff Kathy Ann Ellen filed a Chapter 13 Bankruptcy Petition on April 5, 1994 in the United States Bankruptcy Court, Northern District of Alabama, Eastern Division, case number 94-40704, which petition is presently pending.

ARGUMENT:

Where the Complaint fails to state a cause of action against a resident Defendant that joinder is considered

fraudulent for the purpose of determining diversity jurisdiction in the Federal Court. This type of fraudulent or improper joinder does not prevent removal of a case on the grounds of diversity of citizenship. *Covington v. Indemnity Insurance Company of North America*, 251 F. 2d 930, 934 (5th Cir. 1958); Memorandum Opinion entered by Judge Robert B. Propst on February 26, 1993, in the case of *John Heald v. Globe Life and Accident Health Insurance Company*, CV 92-PT-2497-S (N.D. Ala.), copy attached as Exhibit "A".

In determining whether a defendant has been fraudulently joined, the court has expressed:

> [D]etermination of fraudulent joinder is to be based on whether there is a real intention on colorable grounds to procure a joint judgment . . . [T]here must be some reasonable basis for believing that there is joint liability. The joinder is fraudulent if it is clear that, under the law of the state in which the action is brought, the facts asserted by the plaintiff as the basis for liability of the resident defendant could not possibly create such liability so that the assertion of the cause of action is as a matter of local law plainly a sham and frivolous. And a joinder is fraudulent if the facts asserted with respect to the resident defendant are shown to be so clearly false as to demonstrate that no factual basis existed for any honest belief on the part of the plaintiff that there was joint liability.

Mask v. Chrysler Corporation, 825 F. Supp. 285, 288 (N.D. Ala. 1993).

The Eleventh Circuit has set forth a two-fold test for determining a joinder is fraudulent:

> (1) look to see whether there is no possibility the plaintiff can establish any cause of action against the resident defendant; and (2) look to

> see whether plaintiff has fraudulently pled jurisdictional facts in order to bring the resident defendant into state court. *Cabalceta v. Standard Fruit Company*, 883 F. 2d 1553, 1561 (11th Cir. 1989); *Insinga v. LaBella*, 845 F. 2d 249, 254 (11th Cir. 1988); *Mask*, 825 F. Supp. at 288.

The Plaintiff Ellen cannot prevail against the Defendant Sprouse for liability arising out of a consumer transaction since she has had no contact with the Defendant Sprouse or his unnamed employer.

The Plaintiff Whitson cannot prevail against the Defendant Sprouse in the Marengo County lawsuit because of his prior action against Defendant Sprouse in Talladega County. The Alabama case law holds that the first court seized of the issues involved retains jurisdiction to conclusion. *Ex parte, R.H. Moore Sr.*, 382 So. 2d 548 (Ala. 1980). The rule is stated in *Statham v. Statham*, 276 Ala. 675, 679, 166 So. 2d 403 (1964) to be:

> Stated differently, where a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to appellate authority, until the matter is finally and completely disposed of, and no court of concurrent jurisdiction will interfere in the absence of showing that some specific equity exists in favor of the complainant with which the court first taking jurisdiction is without authority to deal. - *Jordan v. Jordan*, 251 Ala. 620, 38 So. 2d 865. And the second court will be prohibited from proceeding with the cause - *Glazner v. Jenkins*, 237 Ala. 262, 186 So. 475.

Plaintiff Ellen does not have the facts on which to have an action against Defendant Sprouse. By his election, Plaintiff Whitson must seek whatever remedy he may have in the Talladega Circuit Court. This leaves but one conclusion: Sprouse was made a Defendant in the

Marengo County Circuit Court to defeat the diversity jurisdiction of the Federal Court. This is a prime example of a fraudulent joinder that the Federal Court can ignore in determining jurisdiction.

/s/ William B. Hairston, Jr.
William B. Hairston, Jr.
420-92-8666

/s/ Judith D. Holt
Judith D. Holt
423-90-2002

Attorneys for Defendants
Voyager Insurance Companies
Voyager Guaranty Insurance Company
Voyager Life & Health Insurance Company
Voyager Group, Inc.
Voyager Life Insurance Company
Voyager Property & Casualty Insurance Company

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/s/ William Pritchard III
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/s/ James G. Henderson

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/s/ Clark B. Carpenter, Jr.

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Albert Benjamin Sprouse, Jr.

OF COUNSEL:
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O'BRIEN & LAZENBY
P.O. Box 277
Talladega, AL 35610
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CERTIFICATE OF SERVICE

I certify that I have served a copy of the above and foregoing on all attorneys of record placing a copy of same in the United States mail, properly addressed, and first class postage prepaid this 11th day of July, 1994.

/s/ Judith D. Holt

Judith D. Holt

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Talladega, AL 35160

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

JOHN HEALD, et al,)

PLAINTIFFS,)

VS.) CV92-PT-2497-S

GLOBE LIFE AND ACCIDENT
INSURANCE COMPANY, et al,)

DEFENDANTS.)

MEMORANDUM OPINION

On September 14, 1992, plaintiffs filed suit against defendant Globe Life and Accident Insurance Co. ("Globe Life") and defendant Torchmark Corporation ("Torchmark") in the Circuit Court of Jefferson County, Alabama. On October 23, 1992, Globe Life removed the civil action to this court.[1] Plaintiffs responded by filing a Motion to Remand on November 20, 1992. Plaintiffs' Motion to Remand is now before this court.

All plaintiffs are resident citizens of the state of Alabama. Globe Life is a corporation organized and existing under the laws of the state of Delaware with its principal place of business in the state of Oklahoma. Torchmark is a corporation organized and existing under the laws of the state of Delaware with its principal place of business in the state of Alabama. There is no dispute that Globe Life is a wholly owned subsidiary of Torchmark and that

[1]Torchmark joined Globe Life in the removal of the action.

Globe Life and Torchmark share some common officers and directors.

CONTENTIONS OF THE PARTIES

Globe Life contends that, under Alabama law, plaintiffs cannot establish a cause of action against Torchmark since Globe Life was not operated as a "mere instrumentality" of Torchmark. Globe Life contends that the factors that must exist in order to disregard the corporate entity of Globe Life in an effort to reach Torchmark are not present in this case. Thus, Globe Life contends that Torchmark was fraudulently joined and should be disregarded for purposes of this court's diversity jurisdiction.

Plaintiffs argue that Globe Life was operated as a "mere instrumentality" of Torchmark. In support of this contention, plaintiffs offered the following facts: (1) Globe Life was a wholly owned subsidiary of Torchmark; (2) Globe Life and Torchmark shared some common officers and directors; (3) Torchmark held itself out as being in the insurance business; and (4) Globe Life was advertised as a Torchmark company thereby showing a mingling of identities. Plaintiffs argue that these facts indicate the possibility of establishing a cause of action against Torchmark. Thus, plaintiffs argue that Torchmark was not fraudulently joined and request that the case be remanded to Jefferson County Circuit Court.

ANALYSIS

Plaintiffs cannot defeat a nonresident defendant's right to removal by joining a resident defendant against whom plaintiffs cannot establish a cause of action. *See Covington v. Indemnity Ins. Co.*, 251 F.2d 930, 934 (5th Cir. 1958), *cert. denied*, 357 U.S. 921. The joinder of such a resident defendant is regarded as a fraudulent joinder. *Id.*

There is a presumption in Alabama that a corporation is a separate and distinct legal entity from its shareholders. *First Health, Inc. v. Blanton,* 585 So. 2d 1331, 1334 (Ala. 1991); *Forester & Jerue, Inc. v. Daniels,* 409 So. 2d 830, 832 (Ala. 1982). The mere fact that another corporation owns all of the stock of a corporation does not, of itself, destroy the separate corporate entity. *First Health,* 585 So. 2d at 1334. There are, however, certain situations in which the corporate entity will be disregarded. One such instance is where a parent corporation so controls the operation of a subsidiary as to make the subsidiary a mere adjunct, instrumentality, or alter ego of the parent corporation. *Duff v. Southern Railway Co.,* 496 So. 2d 760, 762 (Ala. 1986); *Ex parte Baker,* 432 So. 2d 1281, 1284 (Ala. 1983). In an effort to circumvent difficulties in the application of such conclusory terms as "adjunct," "alter ego," and "instrumentality," the Alabama Supreme Court has developed a standard to be applied to determine whether a corporate entity should be disregarded. In order for a parent corporation to be held liable for the acts of its subsidiary, three elements must be present:

> (1) The dominant party must have complete control and domination of the subservient corporation's finances, policy and business practices so that at the time of the attacked transaction the subservient corporation had no separate mind, will, or existence of its own;
>
> (2) The control must have been misused by the dominant party; [and]
>
> . . .
>
> (3) The misuse of this control must proximately cause the harm or unjust loss complained of.

First Health, 585 So. 2d at 1334-35.

These three elements are not present in this case. The evidence does not indicate that Torchmark exercised such complete control and domination that Globe Life had no separate mind, will, or existence of its own. The evidence also does not indicate that any control exercised by Torchmark was misused. Finally, there is no evidence that any exercise of control by Torchmark proximately caused the alleged harm. In the absence of these three elements, plaintiffs are unable to establish a cause of action against Torchmark. Accordingly, Torchmark has been fraudulently joined.

Since the plaintiffs have not established a cause of action against Torchmark, Torchmark will be dismissed. *See Covington v. Indemnity Ins. Co.*, 251 F.2d 930 (5th Cir. 1958) (court affirmed district court's dismissal of resident defendant that was fraudulently joined to defeat diversity jurisdiction). Also, plaintiffs' Motion to Remand will be denied.

This 26th day of February, 1993.

/s/ Robert B. Propst

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

KATHY ANN ELLEN;	*	
JACKIE E. WHITSON, et al.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	CASE NO.
VOYAGER INSURANCE	*	94-0525-BH-C
COMPANIES; VOYAGER	*	
GUARANTY INSURANCE	*	
COMPANY; VOYAGER LIFE	*	
& HEALTH INSURANCE	*	
COMPANY; VOYAGER LIFE	*	
INSURANCE COMPANY;	*	
VOYAGER GROUP, INC.;	*	
VOYAGER PROPERTY &	*	
CASUALTY INSURANCE	*	
COMPANY; ALBERT	*	
BENJAMIN SPROUSE, JR.; et al.,	*	
	*	
Defendants.	*	
	*	

AMENDMENT TO NOTICE OF REMOVAL

COME NOW the Defendants and amend their Notice of Removal pursuant to 28 U.S.C. § 1441 and § 1332, to include as additional grounds for removal 28 U.S.C. § 1452.

/s/ William B. Hairston, Jr.
William B. Hairston, Jr.
420-92-8666

/s/ Judith D. Holt
Judith D. Holt
423-90-2002

Attorneys for Defendants
Voyager Insurance Companies
Voyager Guaranty Insurance Company
Voyager Life & Health Insurance Company
Voyager Group, Inc.
Voyager Life Insurance Company
Voyager Property & Casualty Insurance Company

OF COUNSEL:
ENGEL, HAIRSTON & JOHANSON, P.C.
109 North 20th Street
P.O. Box 370027
Birmingham, AL 35237
(205) 328-4600

CERTIFICATE OF SERVICE

I certify that I have served a copy of the above and foregoing on all attorneys of record by placing a copy of same in the United States mail, properly addressed, and first class postage prepaid this 13th day of July, 1994.

/s/ Judith D. Holt
Judith D. Holt

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

KATHY ANN ELLEN;	*	
JACKIE E. WHITSON, et al.,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	
	*	CASE NO.
VOYAGER INSURANCE	*	94-0525-BH-C
COMPANIES; VOYAGER	*	
GUARANTY INSURANCE	*	
COMPANY; VOYAGER LIFE &	*	
HEALTH INSURANCE	*	
COMPANY; VOYAGER LIFE	*	
INSURANCE COMPANY;	*	
VOYAGER GROUP, INC.;	*	
VOYAGER PROPERTY &	*	
CASUALTY INSURANCE	*	
COMPANY; ALBERT	*	
BENJAMIN SPROUSE, JR.; et al.,	*	
	*	
Defendants.	*	
	*	

AMENDMENT TO NOTICE OF REMOVAL

The Defendants amend the Notice of Removal by including as a part of the pleadings in the state court referred to as Exhibit "A", the attached ex parte Order Granting Conditional Class Certification and for grounds of said amendment state as follows:

1. The initial Summons and Complaint was served June 18, 1994. The Defendant had thirty days from that date in which to file an Answer to the Complaint. (Rule

12 (a) Alabama Rules of Civil Procedure) Nineteen days after service and before any Defendant had entered an appearance, the state court entered an ex parte order "after due deliberation and consideration of the totality of the circumstances and the record and for good cause shown . . . " granting conditional class certification.

2. At the time of the conditional certification, the record before the state court consisted of a Complaint.

3. As of this date the certification order has not been served on the individual Defendant, which in itself supports the allegations of fraudulent joinder.

4. Within the thirty days following service of process the Defendants removed the state court case to this court. At the time of the removal, the Defendants were without notice or knowledge that the state court had entered an order granting conditional class certification. That order is attached to this amendment to be included as a part of the record of the state court as is set out in Exhibit "A" to the Notice of Removal.

/s/ William B. Hairston, Jr.

William B. Hairston, Jr.
420-92-8666

/s/ Judith D. Holt

Judith D. Holt
423-90-2002

Attorneys for Defendants
Voyager Insurance Companies
Voyager Guaranty Insurance Company
Voyager Life & Health Insurance Company
Voyager Group, Inc.
Voyager Life Insurance Company
Voyager Property & Casualty Insurance Company

IN THE CIRCUIT COURT OF
MARENGO COUNTY, ALABAMA

KATHY ANN ELLEN; JACKIE E. WHITSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
VS.	)	CASE NUMBER CV 94-69
VOYAGER PROPERTY AND CASUALTY INSURANCE COMPANY, et al.,	)	
Defendants.	)	

ORDER GRANTING CONDITIONAL
CLASS CERTIFICATION

The plaintiffs complaint in the above-styled action requested certification of this action as a class action against the named defendants. The law is well established that the Court should certify a class action "[a]s soon as practicable after the commencement of an action brought as a class action" and that the order certifying the class action may be conditional. Rule 23(c)(1) Ala. R. Civ. P. After due deliberation and consideration of the totality of the circumstances and the record, and for good cause shown, it is hereby ORDERED that:

1. Civil Action No. CV 94-69 styled Kathy Ann Ellen, et al. v. Voyager Property and Casualty Insurance Company,

et al., is hereby conditionally certified as a class action pursuant to the Alabama Rules of Civil Procedure, Rule 23(b)(2). The class hereby certified consists of:

> Any Alabama residents who, during the course of executing a consumer loan agreement in Alabama, have purchased a policy of Credit Property Insurance and/or a policy of Non-Filing Insurance issued and/or serviced by the defendants, Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; and Voyager Property and Casualty Insurance Company.

The class does not include the following:

> (1) Any Alabama resident who has previously filed or settled his or her claims against Voyager Insurance Companies; Voyager Guaranty Insurance Company; Voyager Life and Health Insurance Company; Voyager Life Insurance Company; Voyager Group, Inc.; and Voyager Property and Casualty Insurance Company or obtained a judgment in any court against any of said Defendants on any claims arising out of the purchase of Credit Property Insurance and/or a policy of Non-filing Insurance issued and/or serviced by the defendants; or (2) any person who is deceased at the time of the certification of the class described above.

Certification of the class and the findings in this order are conditional pending further discovery and procedures with regard to final certification of the class.

2. Kathy Ann Ellen and Jackie E. Whitson are designated as class representatives, and Lloyd W. Gathings, Harvey B. Campbell, Jr. and Huel Love, Jr. are designated as counsel for the class.

3. The Court makes the following findings: that the named plaintiffs and class counsel are adequate representatives of and for the Class, and that all requirements of Rules 23(a) and 23(b)(2) Alabama Rules of Civil Procedure are met; that the class is so numerous that the joinder of all members is impracticable; that class counsel are able and experienced and will adequately represent the class; that there are questions of law and fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; the named plaintiffs are adequate representatives of the class; and that the plaintiffs will fairly and adequately represent the interests of the class. The Court finds that maintenance of this action as a class action pursuant to Rule 23(b)(2) Alabama Rules of Civil Procedure is superior to any other means of adjudicating the claims herein raised.

4. Pending determination of this class action, the named plaintiffs and all members of the described class are hereby enjoined and prohibited from commencing any action, either directly, individually, representatively, or in any capacity, asserting any claims set forth in the complaint filed in this case.

5. Defendants shall provide to the plaintiffs within 45 days from the date of this order the names and last known addresses of all persons said Defendants' records indicate would fall within the above-described class.

6. Plaintiffs shall notify all persons whose names are produced in accordance with paragraph 5 above of this action, including a copy of this order in such notification, by U.S. Mail within 30 days after such names and addresses are produced.

DONE, ORDERED, ADJUDGED AND DECREED, this 7 day of July, 1994.

/s/c Claud D. Neilson

Claud D. Neilson
Circuit Court Judge

Copies mailed 7/11/94
Lloyd W. Gathings, Esq.
Huel Love, Jr., Esq.
Harvey B. Campbell, Esq.
All Defendants

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

KATHY ANN ELLEN; JACKIE E. WHITSON; et al.,	*	
Plaintiffs,	*	
v.	*	
VOYAGER INSURANCE COMPANIES; VOYAGER GUARANTY INSURANCE COMPANY; VOYAGER LIFE & HEALTH INSURANCE COMPANY; VOYAGER LIFE INSURANCE COMPANY; VOYAGER GROUP, INC.; VOYAGER PROPERTY & CASUALTY INSURANCE COMPANY; ALBERT BENJAMIN SPROUSE, JR.; et al.,	*	CASE NO._____
Defendants.	*	

MOTION TO TRANSFER VENUE

The Defendants move the District Court for the Southern District of Alabama to transfer the above styled case to the District Court for the Northern District of Alabama by authority of 28 U.S.C. § 1404 and for grounds of said motion sets down and assigns as follows:

1. The only Defendants doing business by agent in Marengo County, Alabama are Voyager Life Insurance Company and Voyager Guaranty Insurance Company. The agent for these two Defendants are not involved in the matters alleged in the Complaint.

2. The Defendant Albert Benjamin Sprouse, Jr. is a resident of Talladega County, Alabama which is located in the North District of Alabama.

3. The Defendant Albert Benjamin Sprouse, Jr. is employed as the manager of Farmers Furniture Company store in Talladega County, Alabama.

4. The Plaintiffs are resident of Talladega County, Alabama.

5. The Plaintiff Jackie E. Whitson has made purchases of consumer goods and credit insurance from the Talladega store where the Defendant Sprouse is employed.

6. The Plaintiff Jackie E. Whitson filed a lawsuit in the Talladega County, Alabama Circuit Court which names the Defendant Sprouse as a Defendant and alleges the commission of identical wrongs as that alleged in the suit filed in Marengo County, Alabama Circuit Court.

7. The books and records referred to the Complaint are located in Talladega County, Alabama.

8. The witnesses, including the Plaintiffs reside in Talladega County, Alabama.

9. The Plaintiff Kathy Ann Ellen has a Chapter 13 case presently pending in the Bankruptcy Court for the Northern District of Alabama.

10. The lawyers for both the Plaintiffs and the Defendants maintain offices in the Northern District of Alabama.

11. This action could (should) have been initiated in the Northern District of Alabama.

12. For the convenience of the parties and witnesses and in the interest of justice the case is due to be transferred to the Northern District of Alabama.

/s/ William B. Hairston, Jr.
William B. Hairston, Jr.
420-92-8666

/s/ Judith D. Holt
Judith D. Holt
423-90-2002

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the above and foregoing on all attorneys of record by placing a copy of same in the United States mail (OR BY HAND DELIVERY), properly addressed, and first class postage prepaid this 11th day of July, 1994.

/s/ Judith D. Holt

Judith D. Holt

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APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

KATHY ANN ELLEN;	*	
JACKIE E. WHITSON; et al.,	*	
	*	
Plaintiffs,	*	CIVIL ACTION NO.:
v.		94-AR-2679-E
VOYAGER GUARANTY	*	
INSURANCE COMPANY,	*	
et al.,	*	
	*	
Defendants.	*	
	*	

MOTION TO RECONSIDER ORDER
OF ABSTENTION AND REMAND

Voyager Guaranty Insurance Company moves the Court to reconsider its Order of Abstention and Remand on the ground that the Memorandum Opinion fails to take into consideration the elements of this case that give rise to the fraudulent joinder that gives the Federal Court jurisdiction.

To justify the filing of this motion, Voyager would show the Court that this case came before the Court for a conference on November 9, 1994. Voyager understood that this was an introductory conference to acquaint the Court with the proceedings before the District Court of the Southern Division. Voyager was left with the impression that once this Court had the opportunity to familiarize the Court with the various elements of the case, there would be a status and a scheduling conference.

This case was removed to the Federal Court on dual grounds. One was the pendency of a bankruptcy petition filed by Kathy Ann Ellen. The other was the fraudulent joinder of the Defendant Sprouse.

Up to the November 9, 1994 conference, it had virtually been taken for granted that there had been a fraudulent joinder by the addition of the Defendant Sprouse as a defendant. The focus of the issues before the District Court had been the amount in controversy.

AMOUNT IN CONTROVERSY

On November 9, 1994, the Plaintiffs' attorney advised the Court that the damages of the named Plaintiffs would exceed $50,000.00 exclusive of interest and costs if this was an individual action. The attorney unequivocally stated in open court that if either Plaintiff was suing alone, the case would be more than $50,000.00.

That statement constitutes an evidentiary admission under Rule 801(d)(2)(C) of the Federal Rules of Evidence. In part, Rule 801 provides:

> (2) Admission by party-opponent. — The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, ...

Provision "(C)" allows in evidence statements made by an attorney in a representational capacity. *Hanson v. Waller*, 888 F.2d 806, 814 (11th Cir. 1989); see e.g., *United States v. Ojala*, 544 F.2d 940, 946 (8th Cir. 1976); *Williams v. Union Carbide Co.*, 790 F.2d 552, 555-56 (6th Cir. 1986).

An attorney has authority to make admissions that are directly related to the management of the litigation.

Hanson, 888 F.2d at 814. In essence, the attorney is deemed an agent of the party, with implied authority to act in judicial proceedings for which the attorney is employed. *Massey v. Educators Investment Corporation of Alabama, Inc.*, 420 So. 2d 77, 78 (Ala. 1982).

Alabama law allows a statement by a party's attorney to be evidence of the fact so stated. That is:

> [t]he admission of a lawyer is admissible against his client if, but only if, made in the performance of his duty to the client and within the scope of his authority from the client.

McElroy's Alabama Evidence, 4th Ed.; *Southern Ry. Co. v. City of Birmingham*, 271 Ala. 114, 112 So. 2d 599 (1960) (letter from city attorney to railroad admissible); *First Nat. Bank v. Culverhouse*, 26 Ala. App. 560, 164 So. 124 (1935) (any representation by attorney for bank held competent and relevant); *McRea v. Insurance Bank of Columbus*, 16 Ala. 755 (1849) (attorney admission of amount collected on settlement competent evident against client); *Starke v. Kenan*, 11 Ala. 818 (1847) (admission by attorney for purpose of trial binds client and is conclusive of fact admitted).

The general proposition is that "[s]tatements made by an attorney concerning a matter within his employment may be admissible against the party retaining the attorney." *United States v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984) (citing *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981) cert. denied, ___ U.S. ___, 103 S.Ct. 1891, 77 L.Ed. 2d (1983)). For example, the binding effect on a party of an unambiguous and clear admission of fact by an attorney in an opening statement is well established in both civil and criminal cases. *McKeon*, 738 F.2d at 30; *Rhoades, Inc. v. United Air Lines*, 340 F.2d 481, 484 (3d Cir. 1965) (an admission of counsel during course of trial binding on client); *Collins v. Texas Company*, 267 F.2d

257, 258 (5th Cir. 1959) (plaintiff bound by admission in opening statement); *Dick v. United States*, 40 F.2d 609, 611 (8th Cir. 1930) (admission in opening statement eliminated need for proof of element of offence and was evidence of the fact.); *Oscanyan v. Arms Co.*, 103 U.S. 261, 263, 26 L.Ed. 539 (1880).

As the Court noted at the close of the conference, that admission still left open the question of the fraudulent joinder.

FRAUDULENT JOINDER

The undisputed facts on which fraudulent joinder is based are:

The pendency of a case in the Circuit Court of Talladega County, Alabama (CV 94-122) where Jackie E. Whitson (the Plaintiff here) is a Plaintiff and Albert Benjamin Sprouse, Jr. (a Defendant here) is one of the Defendants. The Talladega County case was filed on or about April 25, 1994 — over a month before this case was filed.

A copy of the Talladega case is attached to this motion. (Exhibit "A") The cases are identical except that the Talladega case alleges that Sprouse, Richard McQueen and Farmers Furniture of Alabama, Inc. conspired to sell Whitson non-filing insurance in violation of the Alabama statutes; and suppressed information that they had a duty to disclose about non-filing insurance. In this case, the allegations are that Sprouse and Voyager conspired for the same purpose. Sprouse is the store manager for Farmers Furniture and an agent to place Voyager's insurance.

Alabama Code § 6-5-440 (1975) prohibits simultaneous actions for the same cause against the same party and provides:

> [n]o plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case, the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times.

When there exists no arguably reasonable basis for state law to impose liability on a resident defendant, the claim is deemed fraudulent and lack of diversity will not prevent removal to federal court. *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 116 (5th Cir. 1979); *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981) (decisions of 5th Circuit binding as precedent on federal courts within 11th Circuit).

The Eleventh Circuit has set forth a two-fold test for determining whether a joinder is fraudulent:

> (1) look to see whether there is no possibility the plaintiff can establish any cause of action against the resident defendant; and (2) look to see whether plaintiff has fraudulently pled jurisdictional facts in order to bring the resident defendant into state court. *Cabalceta v. Standard Fruit Company*, 883 F.2d 1553, 1561 (11th Cir. 1989); *Insigna v. LaBella*, 845 F.2d 245, 254 (11th Cir. 1988); *Mask v. Chrysler Corporation*, 825 F.Supp. 285, 288 (N.D. Ala. 1993).

Never has a case fit so squarely within these parameters set by the Eleventh Circuit.

Plaintiff Whitson cannot prevail against Defendant Sprouse in the Marengo county lawsuit because of his prior action against Defendant Sprouse in Talladega County. The Alabama law holds that the first court seized of the issues involved retains jurisdiction to conclusion.

Ex parte. R.H. Moore, Sr., 382 So. 2d 548 (Ala. 1980). The rule is stated in *Statham v. Statham*, 276 Ala. 675, 679, 166 So. 2d 403 (1964) to be:

> Stated differently, where a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to appellate authority, until the matter is finally and completely disposed of, and no court of concurrent jurisdiction will interfere in the absence of showing that some specific equity exists in favor of the complainant with which the court first taking jurisdiction is without authority to deal. – *Jordan v. Jordan*, 251 Ala. 620, 38 So. 2d 865. And the second court will be prohibited from proceeding with the cause - *Glazner v. Jenkins*, 237 Ala. 262, 186 So. 475.
>
> That is,
>
> [the] first court acquiring jurisdiction of the same cause of action between the same parties should proceed with it and cannot be deprived of this authority by a subsequent suit in another court of concurrent jurisdiction. *Statham*, 276 Ala. at 679.
>
> Where state law provides no reasonable basis on which to impose liability upon a non diverse defendant, the joinder of such party is deemed fraudulent and does not defeat diversity for federal jurisdictional purpose. *Tedder v. FMC Corp.*, 590 F.2d 115, 116 (5th Cir. 1979) (FNI)

If, as here, a defendant has been fraudulently joined, his presence must be disregarded by the court when determining the existence of diversity jurisdiction and assessing the propriety of removal. See *Lejenue v. Shell Oil Co.*, 950 F.2d 267, 271 (5th Cir. 1992); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989); *B., Inc. v.*

Miller Brewing Co., 663 F.2d 545, 549 (5th Cir. 1981); *Villar v. Crowley Maritime Corp.*, 780 F. Supp. at 1473.

By his election, Plaintiff Whitson must seek whatever remedy he may have in the Talladega County case. Any alleged claim by Plaintiff Whitson against Defendant Sprouse is already being litigated in this prior lawsuit. (Attached is a copy of the Order of class certification entered in the Talladega case. Exhibit "B") Since the Talladega County court first acquired proper jurisdiction over Defendant Sprouse, the Plaintiffs have no ability to sue him in the Marengo County case. There can only be one inevitable conclusion–that Defendant Sprouse was named as a Defendant in the later Marengo County case to defeat diversity jurisdiction of the federal court. That tactic is the epitome of a fraudulent joinder.

In its Order of Abstention and Remand, the Court has failed to give consideration to the prior pending case in Talladega County between the Plaintiff Whitson and the Defendant Sprouse.

BANKRUPTCY

While 28 U.S.C. § 1334(b) states in pertinent part that the district courts shall have "original" but not "exclusive" jurisdiction of all civil proceedings arising under Title 11, subsection (e) expands that to read:

> (e) The district court in which a case under Title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

Ellen's bankruptcy was filed April 5, 1994. With that filing the claim evidenced by this case was the "property of the estate" over which the United States District Court had "exclusive" jurisdiction.

On September 27, 1994, Ellen amended her bankruptcy petition to show that this claim was, in fact, property of the estate. (A copy of the amendment is attached as Exhibit "C." Note Schedule B – page 3.) The provision of the statute relating to equities in remand to not overcome this statutory grant of exclusive jurisdiction.

CONCLUSION

This case was properly removed on either ground set out in the Petition to Remove. In its Order of Abstention and Remand the Court has not given proper consideration to the prior pending state case or the exclusive jurisdiction conferred by 28 U.S.C. § 1334(e).

/s/ William B. Hairston, Jr.
William B. Hairston, Jr.
420-92-8666

/s/ Judith D. Holt
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CERTIFICATE OF SERVICE

I certify that I have served a copy of the above and foregoing on the following by placing a copy of same in the United States mail properly addressed, and first class postage prepaid this 17th day of January, 1995.

/s/ Judith D.Holt
Judith D. Holt

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EXHIBIT "A"

IN THE CIRCUIT COURT FOR
TALLADEGA COUNTY, ALABAMA

JACKIE E. WHITSON,	)	
	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO.
	)	CV-94-177
FARMERS FURNITURE OF ALABAMA, INC.; RICHARD MCQUEEN, AN INDIVIDUAL; ALBERT BENJAMIN SPROUSE, AN INDIVIDUAL, ET AL.,	)	
	)	
Defendants.	)	

COMPLAINT

1. Plaintiff brings this action on behalf of all members of a class composed of the general public who have sustained damages by reason of tortious conduct including misrepresentations and violations of the Alabama Mini Code regarding financing of items with Farmers Furniture of Alabama. Plaintiff further avers that there are questions of law or fact common to the class such as the business practices including the terms of financing of furniture purchased from the defendant, Farmers Furniture of Alabama, Inc.

2. Plaintiff further avers that the perquisites for class action treatment contained in Rules 23(b)(1) and 23(b)(2) ARCP do not apply to this action, but rather, pursuant to Rule 23(b)(3) ARCP questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Plaintiff avers it is not practicable for the members of the class to individually prosecute this action; it is desirable to concentrate these claims in a common forum, and there are no difficulties likely to be encountered in the management of a class action.

3. The defendant, Farmers Furniture Company of Alabama, Inc., is engaged in the business of selling furniture and jewelry in the State of Alabama.

4. The defendant, Richard McQueen, is a resident of the State of Alabama and was the credit manager at the Farmers Furniture Company of Alabama, Inc., 715 East Battle Street, Talladega, Alabama, on or about December 24, 1993.

5. The defendant, Albert Benjamin Sprouse, is a resident of the State of Alabama and was the store manager and/or agent for Farmers Furniture Company of Alabama, Inc., 715 East Battle Street, Talladega, Alabama, on or about December 24, 1993.

6. On or about the 24th day of December, 1993, the defendant, Farmers Furniture Company of Alabama, Inc., sold jewelry and furniture to the plaintiff, Jackie E. Whitson, and entered a financing agreement subject to the Alabama Mini code. Jackie E. Whitson was continuing to make payments on this financing agreement within one year of the date of the filing of this suit and discovered the fraud committed by defendants within one year of the date of the filing of this suit.

7. At the aforesaid times and places the defendant, Farmers Furniture Company of Alabama, Inc., acting by and through its agents and/or employees represented to the plaintiff and other class members and/or was responsible for establishing and implementing financing agreements that made it necessary for plaintiff and other class members to obtain non-filing insurance for purposes of perfecting a security interest in the furniture and jewelry.

8. These representations were false and the defendants knew they were false and made with the intent to deceive the plaintiff, and other class members, and induce her to purchase non-filing insurance. Plaintiff and other class members relied upon these representations to their detriment.

9. The defendant, Farmers Furniture Company of Alabama, Inc., its agents and/or employees have a superior knowledge of the terms of financing and requirements for perfecting security interests in the furniture and jewelry sold to the plaintiff and other class members.

10. Having such knowledge the defendant, Farmers Furniture Company of Alabama, Inc., its agents and/or employees had a duty to disclose to the plaintiff and other class members that a purchase money security interest is perfected without filing and that non-filing insurance was not necessary.

11. The defendant, Farmers Furniture Company of Alabama, Inc., intentionally and/or willfully suppressed information that it had a duty to disclose pertaining to the purchase of non-filing insurance in order to induce the plaintiff and other class members to purchase non-filing insurance.

12. As a result of the above described misrepresentations and/or suppression by the defendant, Farmers Furniture Company of Alabama, Inc., its agents and/or employees, the plaintiff and other class members were damaged by purchasing non-filing insurance.

13. The defendant, Farmers Furniture Company of Alabama, Inc., acting by and through its agents and/or employees, violated the Alabama Mini-Code in requiring the plaintiff and other class members to purchase non-filing insurance that was wrongfully charged as part of the amount financed when defendant's interest in the goods was already perfected upon purchase. The pre-

mium for said insurance constituted a finance charge under Ala. Code § 5-19-1 resulting in the total finance charge violing the maximum finance charge established in Ala. Code § 5-19-3.

14. The defendant, Albert Benjamin Sprouse, at pertinent times hereto was the store manager and/or agent of the Farmers Furniture Company of Alabama, Inc., Talladega store and as such was in charge of and responsible for the financing agreements and sales at the Talladega store, including sales procedures to be used at the store. Said defendant was negligent and/or wanton in performing said duties and put into force policies in violation of the Alabama Mini-Code.

15. The defendant, Richard McQueen, at pertinent times hereto was the credit manager of the Farmers Furniture Company of Alabama, Inc., Talladega store and as such was in charge of and responsible for the financing agreements and sales at the Talladega store, including sales procedures to be used at the store. Said defendant was negligent and/or wanton in performing said duties and put into force policies in violation of the Alabama Mini-Code.

16. The above described misrepresentation, suppression, violation of the Alabama Mini-Code is part of a combination, artifice and conspiracy to defraud the plaintiff and other class members by requiring them to pay for non-filing insurance which is not necessary.

17. As a result of the above described conspiracy, misrepresentation, suppression, violations of the Alabama Mini-Code and other wrongful conduct of the defendants, Farmers Furniture Company of Alabama, Inc., its agents and/or employees the plaintiff and other class members were damaged in that they purchased non-filing insurance.

WHEREFORE, plaintiffs demands judgment against the defendants for such actual, compensatory and punitive damages as may be determined by a jury, plus interest and costs.

/s/ Lloyd W. Gathings
Lloyd W. Gathings
Attorney for Plaintiffs

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PLAINTIFFS DEMAND A TRIAL BY STRUCK JURY

/s/ Lloyd W. Gathings
Lloyd W. Gathings

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DEFENDANTS TO BE SERVED AS FOLLOWS:

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(CERTIFIED MAIL)
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Richard McQueen (PROCESS SERVER)
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Talladega, Alabama 35160

Albert Benjamin Sprouse (PROCESS SERVER)
715 East Battle Street
Talladega, Alabama 35160

IN THE CIRCUIT COURT OF
TALLADEGA COUNTY, ALABAMA

JACKIE WHITSON,	*	
	*	
Plaintiffs	*	
	*	CASE NUMBER:
vs.	*	CV 94-177
	*	
FARMERS FURNITURE OF ALABAMA, INC.; RICHARD MCQUEEN, an individual; ALBERT BENJAMIN SPROUSE, an individual; Number 1, whether singular or plural, who or which extended consumer credit to the plaintiffs or assisted in the extension of consumer credit to the plaintiffs on the occasions made the basis of this complaint; Number 2, whether singular or plural, who or which received any sum of money from any source whatsoever resulting from the execution of the consumer loan agreements which are the subject of this litigation; Number 3, whether singular or plural, who or which received money from any source whatsoever resulting from the sale to plaintiffs of the policies of insurance which are the subject of this litigation; Number 4, being that legal entity doing business as FARMERS FURNITURE;	*	
	*	
Defendants	*	
	*	

CONSOLIDATED AND AMENDED COMPLAINT

Comes now the plaintiff in the above styled cause, and, pursuant to the provisions of Rules 15 A.R.Civ. P., amends her complaint to add Aubrey J. Strickland, Jr., Robyn Gamble, and Rena Yates as parties plaintiff; to correct the name of the defendant designated as Farmers Furniture Company of Alabama, Inc. to be properly named as Warehouse Home Furnishing Distributors, Inc.; to describe the fictitious defendants named above and in the complaint below; and to add the following claims and allegations:

1. Plaintiffs bring this action on behalf of themselves and all members of a class composed of those individuals who have obtained a consumer loan from defendant Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture in the State of Alabama, and who, during the course of executing the loan agreement, have been assessed a fee by the said Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture which is designated in the consumer credit contract as "NON-FILING INS.". Included within said class is a subclass of individuals who, in addition to being assessed a fee designated as "NON-FILING INS." have also purchased a policy of credit property insurance. Also included within said class is a subclass of individuals who, in addition to being assessed a fee designated as "NON-FILING INS." have also purchased an extended warranty purportedly issued by the said Warehouse Home Furnishing Distributors, Inc., d/b/a Farmers Furniture. Plaintiffs aver that the class is so numerous that joinder of all members is impracticable. The exact size of plaintiffs' class is not known, but the size of the class and the identification of its members is subject to precise determination through information within the exclusive control of the defendants. Plaintiffs aver that there are questions of law and fact common to the class as set out in the various counts

of the complaint hereafter. Plaintiffs further aver that their claims as representatives of the class are typical of the claims of the class. Plaintiffs further aver that in their representative capacity they will fairly and adequately protect the interests of the class.

2. Plaintiffs aver that questions of law or fact common to the members of the class predominate over any questions affecting only individual members. The questions of law or fact which are common to the plaintiffs' class include inter alia: whether, under the provisions of the Alabama Mini-Code, the defendant, Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture, may exempt from the finance charge a premium for insurance in lieu of perfecting a security interest in property when the security for said debt is automatically perfected without filing; whether the charge assessed to each plaintiff for the purchase of a policy of non-filing insurance was in fact used to purchase a policy of "insurance in lieu of perfecting a security interest in property," as that term is defined by the Alabama Mini-Code; whether, under the provisions of the Alabama Mini-Code, the premium for said non-filing insurance constitutes a finance charge; whether the total finance charge assessed in each consumer loan exceeds the maximum finance charge permitted by the Alabama Mini-Code and if so whether the underlying obligation is thereby rendered void; whether the imposition of a fee for non-filing insurance constitutes fraud; whether the defendants were under any obligation to disclose to the plaintiffs that the lien insurance premium would not be used to purchase a policy of insurance in lieu of perfecting a security interest in property; whether the premium for credit property insurance constitutes a finance charge when the amount on insurance purchased exceeds the replacement cost of the insured property, and if so, whether the total finance charge in each consumer credit transaction wherein a

policy of credit property insurance was sold exceeds the maximum finance charge permitted by the Alabama Mini-Code; whether the defendants were under any obligation to disclose to the plaintiffs that the credit property insurance was sold in an amount in excess of the replacement value of the insured property; whether the extended warranty purchased by each plaintiff in the subclass of plaintiffs described above is in fact a policy of insurance, and if so, whether said insurance is sold in violation of the provisions of the Alabama Mini-Code which regulate the sale of insurance in conjunction with a consumer credit transaction; whether the extended warranty constitutes a charge incident to the extension of consumer credit; if the extended warranty constitutes a charge incident to the extension of consumer credit, whether the finance charge assessed in each said consumer loan agreement wherein an extended warranty was sold exceeds the maximum finance charge permitted by the Alabama Mini-Code; whether the defendants were under any obligation to disclose to the plaintiffs that the extended warranty could not be offered in conjunction with a consumer credit transaction; whether the defendants were under any obligation to disclose to the plaintiffs that said defendants could not require the purchase of said extended warranty as a condition to the extension of consumer credit.

3. Plaintiffs aver that a class action is superior to other available methods for the fair and efficient adjudication of the controversy because, inter alia: (a) The commonality of issue of law and fact, as well as the relatively small liability to each class member substantially diminishes the interest of members of the class in individually controlling the prosecution of separate actions; (b) many of the members of plaintiffs' class are unaware of their rights to prosecute and do not have the means or resources to secure legal assistance; (c) there has been little, if any,

litigation already commenced by members of the class to determine the questions presented; (d) it is desirable that the claims be concentrated in this forum due to the fact that the creditor has offices in Alabama which are located in Talladega County and that plaintiffs believe that many members of their class will reside in the Talladega County area, thus facilitating the procurement of additional evidence in this case and; (e) a class action can be managed without undue difficulty since the defendants have regularly committed the violations complained of herein, have used standardized forms in doing so, and are required to have records of their dealings with each member of the class.

COUNT I

4. Each plaintiff herein and the class of plaintiffs which the named plaintiffs represent has obtained a consumer loan in the State of Alabama from the defendant, Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture.

5. At the time of the execution of the consumer loan agreement, each plaintiff was required to purchase from the defendant, Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture a policy of Non-Filing Insurance. In addition to non-filing insurance, each member of a subclass defined in paragraph 1 above was required to a policy of Credit Property Insurance. In addition to non-filing insurance, each member of a subclass defined in paragraph 1 above was required to purchase an extended warranty purportedly issued by the defendant, Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture.

6. At the time of sale of each policy of non-filing insurance, each policy of Credit Property Insurance and each "extended warranty," the defendant, Warehouse Home

Furnishing Distributors, Inc. d/b/a Farmers Furniture was prohibited from exempting from the finance charge the premiums for said non-filing insurance, the premium for said Credit Property Insurance and the charge for the "extended warranty" by reason of the provisions of Code of Alabama (1975) section 5-19-1 et seq. (hereinafter referred to as the Mini-Code) in the following respects:

a. that the Mini-Code only permits a creditor to exempt from the finance charge a premium for "insurance in lieu of perfecting a security interest in property" and that the said defendant's security interest is automatically perfected.

b. that the premium charged for non-filing insurance was not used to purchase a policy of "insurance in lieu of perfecting a security interest in property," but rather was divided between the creditor and the insurer, or between the creditor and another legal entity acting on the insurer's behalf, under a formula which compensates the creditor irrespective of whether its loss is caused by the failure to perfect a security interest in property.

c. that the Credit Property insurance was sold in an amount equal to the gross amount of the loan in violation of Regulation 93, promulgated by the Alabama State Department of Insurance.

d. that the Credit Property insurance was sold in an amount in excess of the replacement cost of the insured property, in violation of Regulation 93, promulgated by the Alabama State Department of Insurance.

e. that the "extended warranty" constitutes a policy of insurance, and is sold in violation of the provisions of the Alabama Mini-Code which regulate the sale of insurance in conjunction with the extension of consumer credit.

f. that purchase of the "extended warranty" was made a condition of the loan.

7. The premium for said non-filing insurance; the premium for said Credit Property Insurance and the charge for said extended warranty constitute finance charges as that term is defined by Code of Alabama (1975) section 5-19-1. The addition of said finance charges to the disclosed finance charge in each consumer credit transaction results in a total finance charge in each transaction which exceeds the maximum amount permitted by the Alabama Mini-Code.

8. Pursuant to the provisions of the Code of Alabama (1975) section 5-19-19, the plaintiffs have made written demand upon the said defendants to refund the finance charges in each consumer loan where credit property insurance or an extended warranty was imposed, and said defendants have refused to respond to said demand.

9. Said excess finance charges have been imposed in deliberate violation of the Alabama Mini-Code, or in reckless disregard thereof. Pursuant to the provisions of Code of Alabama (1975) section 5-19-19, each such consumer loan contract is void and the plaintiffs are entitled to a refund of all principal and all finance charges, together with a reasonable attorney's fee. Alternatively, pursuant to the provisions of said section, plaintiffs are entitled to a refund of twice the finance charge or ten times the excess charge, whichever is greater, together with a reasonable attorney's fee. Alternatively, pursuant to the provisions of said section, plaintiffs are entitled to a refund of the entire finance charge paid.

10. WHEREFORE, premises considered, plaintiffs pray for a judgment against the defendant, Warehouse Home Furnishing Distributors, Inc., under the allegations of Count I of this complaint, in a sum equal to the amount paid by each plaintiff to said defendant pursuant to said void consumer loan contracts, including principal, interest and excess charges together with a reasonable attorney's fee. Alternatively plaintiffs pray for a judgment

against the said defendant in a sum equal to twice the finance charge or ten times the excess charge, whichever is greater, together with a reasonable attorney's fee. Alternatively plaintiffs pray for a judgment against said defendant in a sum equal to the entire finance charge paid to said defendant.

COUNT II

11. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporate those allegations herein by reference.

12. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 4 above, all named and fictitious defendants represented to each said plaintiff that the premium assessed for "NON-FILING INS." was used to purchase a policy of insurance in lieu of perfecting a security interest in property. Said representation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein.

13. The representations made by said defendants were false and the defendants knew they were false, or defendants misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the fee assessed for non-filing insurance did not in fact represent the premium for the purchase of a policy of insurance in lieu of perfecting a security interest in property, and said premium was not in fact used to purchase a policy of non-filing insurance, but rather was divided between the defendant, Warehouse Home Furnishing Distributors, Inc. and the insurance company, or between the said defendant and another legal entity acting on behalf of the insurance company, in a manner which is unrelated to losses associated with the failure to perfect a security interest in property. In reliance upon said rep-

resentations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "NON-FILING INS."

14. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for non-filing insurance and by being required to pay interest on said fee during the duration of the consumer loan agreement.

15. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count II, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT III

16. Plaintiffs reallege the allegations of paragraph 4 and 5 above, and incorporate those allegations herein by reference.

17. On or about the date of the execution of the consumer loan by each plaintiff in the class named above, the defendant, Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture, Richard McQueen, Albert Benjamin Sprouse, and all fictitious defendants were under an obligation to disclose to the plaintiffs all facts material to the execution of the consumer loan agreement. This obligation to disclose arose by reason of the superior knowledge of the said defendants concerning Alabama insurance and consumer finance law and by other facts and circumstances which are particular to these transactions. While under the foregoing duty to disclose, the said defendants concealed from each plaintiff the following facts:

a. That the fee assessed for non-filing insurance would not be used to purchase a policy of insurance in lieu of perfecting a security interest in property.

b. That the Credit Property Insurance was sold in an amount in excess of the replacement value of the insured property.

c. That the extended warranty was not a required feature of the consumer loan agreement.

d. That the extended warranty was actually a policy of insurance which the defendants were prohibited by law from offering in conjunction with the execution of a consumer loan agreement.

e. That the extended warranty duplicates the manufacturers' warranty covering the property.

f. That the extended warranty is worthless during the term of the corresponding manufacturers' warranty.

g. That the said consumer loan agreement contained excessive and undisclosed finance charges.

18. Said defendants concealed said facts from the plaintiffs knowingly and with the intention that the plaintiffs be deceived thereby.

19. As a proximate result of the deceit of the said defendants, plaintiffs were damaged by being induced to pay money to the said defendants as a premium for the said non-filing insurance; by being deprived of that portion of the credit property insurance premium which purchased insurance in excess of the replacement value of the insured property and by being induced to pay money to the said defendants as a premium for an extended warranty.

20. WHEREFORE, premises considered, plaintiffs pray for a judgment against the defendants named above, under the allegations of Count III, in a sum representing both compensatory and punitive damages in an amount

to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT IV.

21. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporated those allegations herein by reference.

22. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 4 above, all named and fictitious defendants represented to each plaintiff that the premium assessed for credit property insurance was calculated in a manner which would provide insurance for the replacement cost of the collateral securing the consumer loan contract. This representation was made to each plaintiff in the language of the consumer loan contract executed by each said plaintiff and in the language of the credit property insurance certificate.

23. The representations were false and the defendants knew they were false, or the defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the credit property insurance premium was calculated on an amount in excess of any insurable interest in property and in excess of the replacement value of the collateral.

24. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the premium for credit property insurance which represents insurance in excess of the replacement value of the collateral.

25. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count IV., in a sum which represents both compensatory and punitive damages and

which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT V.

26. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporated those allegations herein by reference.

27. On or about the date of the execution of each consumer loan by each plaintiff described in paragraph 4 above, all named and fictitious defendants represented to the said plaintiff that the purchase of said extended warranty would obligate the said creditor to keep the property covered by said warranty in repair for the term of said obligation. These representations were made in the language of the consumer loan agreement and the service warranty application executed by each plaintiff described above.

28. The representations were false and the defendants knew they were false, or the defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that the plaintiffs rely thereon. The representations were false in that the warranty sold by said defendants duplicates the manufacturers' warranty on the property covered by said warranty; that, by the terms of said warranty, the defendants are not obligated to perform until the manufacturers' warranty is exhausted; and that, for the term of the manufacturers' warranty on said property the warranty sold by the defendants is worthless.

29. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for an "extended warranty."

30. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count V, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT VI.

31. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporate those allegations herein by reference.

32. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 4 above, all named and fictitious defendants conspired together to deprive each plaintiff of the premium assessed for "NON-FILING INS" by representing to said plaintiff that the premium was used to purchase a policy of insurance in lieu of perfecting a security interest in property. Said representation was made to each plaintiff in the language of the consumer loan contract executed by each plaintiff herein.

33. The representations made by said defendants were false and the defendants knew they were false, or defendants misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that the plaintiffs rely upon them. The representations were false in that the fee assessed for non-filing insurance did not in fact represent the premium for the purchase of a policy of insurance in lieu of perfecting a security interest in property, and said premium was not in fact used to purchase a policy of non-filing insurance, but rather was divided between the defendant, Warehouse Home Furnishing Distributors, Inc. and the insurance company, or between the said defendant and another legal entity acting on behalf of the insurance company, in a manner

which is unrelated to losses associated with the failure to perfect a security interest in property. In reliance upon said representations plaintiffs have paid the defendants the sums of money identified in the consumer loan contract as "NON-FILING INS."

34. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for non-filing insurance and by being required to pay interest on said fee during the duration of the consumer loan agreement.

35. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count VI, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT VII.

36. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporated those allegations herein by reference.

37. On or about the date of execution of each consumer loan contract by each plaintiff described in paragraph 4 above, all named and fictitious defendants conspired together to deprive each plaintiff of the premium for credit property insurance which represents insurance in excess of the replacement cost of the collateral by representing to each plaintiff that the premium assessed for credit property insurance was calculated in a manner which would provide insurance for the replacement cost of the collateral securing the consumer loan contract. This representation was made to each plaintiff in the language of the consumer loan contract executed by

each said plaintiff and in the language of the credit property insurance certificate.

38. The representations were false and the defendants knew they were false, or the defendants recklessly misrepresented the facts or misrepresented the fact by mistake, but did so with the intention that plaintiffs rely upon them. The representations were false in that the credit property insurance premium was calculated on an amount in excess of any insurable interest in property and in excess of the replacement value of the collateral.

39. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the premium for credit property insurance which represents insurance in excess of the replacement value of the collateral.

40. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count VII., in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

COUNT VIII.

41. Plaintiffs reallege the allegations of paragraphs 4 and 5, and incorporated those allegations herein by reference.

42. On or about the date of the execution of each consumer loan by each plaintiff described in paragraph 4 above, all named and fictitious defendants conspired together to deprive each plaintiff of the sum designated as "warranty" or "extended warranty" by representing to the said plaintiff that the purchase of said extended warranty would obligate the said creditor to keep the property covered by said warranty in repair during the term of said

obligation. These representations were made in the language of the consumer loan agreement and the service warranty application executed by each plaintiff described above.

43. The representations were false and the defendants knew they were false, or the defendants recklessly misrepresented the facts or misrepresented the facts by mistake, but did so with the intention that the plaintiffs rely thereon. The representations were false in that the warranty sold by said defendants duplicates the manufacturers' warranty on the property covered by said warranty; that, by the terms of said warranty, the defendants are not obligated to perform until the manufacturers' warranty is exhausted; and that, for the term of the manufacturers' warranty on said property the warranty sold by the defendants is worthless.

44. As a proximate result of the misrepresentations of said defendants as set out above, the plaintiffs have been damaged by being deprived of the fees assessed for an "extended warranty."

45. WHEREFORE, premises considered, the plaintiffs demand judgment against all named and fictitious defendants, under the allegations of Count VIII, in a sum which represents both compensatory and punitive damages and which is to be determined by jury. Plaintiffs pray for such other, further or different relief to which they are entitled.

/s/ Lloyd W. Gathings

Lloyd W. Gathings
Attorney for Plaintiffs

OF COUNSEL:
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BIRMINGHAM, ALABAMA 35203

/s/ Harvey B. Campbell, Jr.
Harvey B. Campbell, Jr.
Attorney for Plaintiffs

OF COUNSEL:
CAMPBELL & CAMPBELL P. C.
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TALLADEGA, AL 35160

/s/ Huel M. Love, Jr.
Huel M. Love, Jr.
Attorney for Plaintiffs

OF COUNSEL:
LOVE, LOVE & LOVE P. C.
P. O. BOX 517
TALLADEGA, AL 35160

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing instrument upon counsel of record for all parties by placing a copy in the United States Mail, first class postage prepaid and addressed as shown below. All service accomplished in the manner set out herein on the *6th* day of July, 1994.

William Shelton Pritchard III
PRITCHARD, MCCALL & JONES
505 N. 20th St. Suite 800
Birmingham, AL 35203-2605

B. Clark Carpenter
WOOTEN, THORTON CARPENTER
OBRIEN & LAZENBY
P. O. Box 277
Talladega, AL 35160

/s/ Harvey B. Campbell, Jr.
Attorney for Plaintiff

EXHIBIT "B"

IN THE CIRCUIT COURT OF
TALLADEGA COUNTY, ALABAMA

JACKIE E. WHITSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	CASE NUMBER:
	)	CV 94-177
WAREHOUSE HOME FURNISHING DISTRIBUTORS, INC. D/B/A FARMERS FURNITURE, et al.,	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING CLASS CERTIFICATION

The plaintiffs to the above-captioned litigation having applied for an Order granting class certification, after due deliberation and consideration of the totality of the circumstances and the record, and for good cause shown, it is hereby ORDERED that:

1. Civil Action No. CV 94-177, *Jackie E. Whitson, et al. v. Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture, et al.* is hereby certified as a class action pursuant to the Alabama Rules of Civil Procedure Rule 23(b)(2). The class hereby certified consists of:

> All persons who have obtained a consumer loan from the defendant, Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture, in the State of Alabama in conjunction with the purchase of items at one of the

> defendant's Alabama stores since May 1, 1986, and have been charged for non-filing insurance, credit life insurance, property insurance, accident and health insurance, or unemployment insurance.

The class *does not* include the following:

> (1) Any person who has previously settled his or her claims against any of the defendants herein and has entered into a legally binding settlement agreement or release, or has obtained a judgment against said Defendants, on any claims arising from the person being charged for non-filing insurance, credit life insurance, property insurance, accident and health insurance, or unemployment insurance; or (2) any person who is deceased at the time of the certification of the class described above.

2. Jackie E. Whitson, Aubrey J. Strickland, Jr., Robyn Gamble, and Rena Yates are designated as class representatives, and Lloyd W. Gathings, II, Harvey B. Campbell, Jr., Ralph Gaines, and Huel Love, Jr. are designated as counsel for the class.

3. The Court makes the following findings: that the named plaintiffs and class counsel are adequate representatives of and for the Class, and that all requirements of Rules 23(a) and 23(b)(2) Alabama Rules of Civil Procedure are met; that the class is so numerous that the joinder of all members is impracticable; that class counsel are able and experienced and will adequately represent the class; that there are questions of law and fact common to the class; the claims of the named plaintiffs are typical of the claims of the class; the named plaintiffs are adequate representatives of the class; and that the plaintiffs will fairly and adequately represent the interests of the class. The Court finds that maintenance of this

action as a class action pursuant to Rule 23(b)(2) Alabama Rules of Civil Procedure is superior to any other means of adjudicating the claims herein raised.

4. Pending final determination of this class action, the named plaintiffs and all members of the described class are hereby enjoined and prohibited from commencing or prosecuting any action, either directly, individually, representatively, or in any capacity, asserting any claims set forth in the complaint as amended, filed in this case.

5. Defendant, Warehouse Home Furnishing Distributors, Inc. d/b/a Farmers Furniture, shall provide to the plaintiffs within 45 days from the date of this order the names and last known addresses of all persons said Defendant's records indicate would fall within the above-described class.

6. Plaintiffs shall submit to the Court within 45 days from the date of this order a proposal on the manner in which class notification should be effected and a copy of the suggested notification.

DONE, ORDERED, ADJUDGED AND DECREED, this 18th day of November, 1994.

/s/ Jerry L. Fielding

Jerry L. Fielding
Circuit Court Judge

EXHIBIT "C"

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

IN RE:		
KATHY ELLEN,	*	CASE NO. 94-40704
DEBTOR	*	CHAPTER 13

MOTION TO MODIFY CHAPTER 13 PLAN

Comes now the above named debtor and amends her Chapter 13 Plan as to the following, to-wit:

1. Debtor amends Section IV (8) of the plan to show that a suit has been brought against Voyager Insurance Companies, et al., or such insurance company that has sold debtor insurance in Debtor shall be allowed to bring any action for fraud, breach of contract, bad faith, truth-in-lending, Mini Code of Alabama violation, violation of Alabama Small loan act, concealed finance charges against the above in such state court or U.S. District Court, or such other court as she decided against any individual, insurance company that may have committed the above described violations. Debtor shall be allowed to be a class member of any class action in which she would otherwise be a member without waiving any of her rights by a confirmation of this Chapter 13 Plan.

2. Debtor further shows that she will notify this Court and the Chapter 13 Trustee of any and all developments in this cause of action as well as in other claims which may prosecute in the State Courts in violation of the above described action. This is not intended to avoid any provisions of Debtor's Chapter 13 Plan that requires debtor to pay her net available income into her Chapter 13 Plan.

3. The remainder of the plan to remain the same as previously filed.

/s/ Harvey B. Campbell, Jr.

Harvey B. Campbell, Jr.
Attorney for Debtor
Campbell & Campbell, P. C.
400 South Court Square
Post Office Drawer 756
Talladega, AL 35160
(205) 761-1858

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing motion to Mavis Willingham, Trustee, P. O. Box 96, Anniston, AL 36202 and to the creditors on this the *26th* day of September, 1994.

/s/ Harvey B. Campbell, Jr.

SCHEDULE B — PERSONAL PROPERTY

Type of Property	Description and Location of Property	Husb. Wife Joint or Comm.	Current Market Value of Debtor's Interests in Property, Without Deducting Any Secured Claim or Exemption
1. Cash on hand.	NONE		0.00
2. Checking, savings or other financial accounts, certificates of deposit, or shares in banks, savings and loan, thrift, building and loan, and homestead associations, or credit unions, brokerage houses, or cooperatives.	checking, Metro Bank, Pell City, AL	W	0.00
3. Security deposits with public utilities, telephone companies, landlords, and others.	NONE		0.00

4. Household goods and furnishings, including audio, video, and computer equipment.	Satilte system	W	2,000.00
	air conditioner	W	1,200.00
	camcorder	W	1,400.00
	entertainment center, dinette set, stove, refrigerator, bunk beds, full bed, washer	W	1,200.00
	sofa	W	168.92
5. Books; pictures and other art objects; antiques; stamp, coin, record, tape, compact disc, and other collections or collectibles.	NONE		0.00
6. Wearing apparel.	clothing	W	150.00
7. Furs and jewelry.	jewelry	W	300.00
8. Firearms and sports, photographic, and other hobby equipment.	NONE		0.00

9. Interests in insurance policies. Name insurance company of each policy and itemize surrender or refund value of each.	NONE	0.00
10. Annuities. Itemize and name each issuer.	NONE	0.00
11. Interests in IRA, ERISA, Keogh, or other pension or profit sharing plans. Itemize.	NONE	0.00
12. Stock and interests in incorporated and unincorporated businesses. Itemize.	NONE	0.00
13. Interests in partnerships or joint ventures. Itemize.	NONE	0.00

14. Government and corporate bonds and other negotiable and non-negotiable instruments.	NONE	0.00
15. Accounts receivable.	NONE	0.00
16. Alimony, maintenance, support, and property settlements to which the debtor is or may be entitled. Give particulars.	NONE	0.00
17. Other liquidated debts owing debtor including tax refunds. Give details.	NONE	0.00
18. Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the	NONE	0.00

debtor other than those listed in Schedule of Real Property.		
19. Contingent and non-contingent interests in estate of a decedent, death benefit plan, life insurance policy, or trust.	NONE	0.00
20. Other contingent and unliquidated claims of every nature, including tax refunds, counterclaims of the debtor, and rights to setoff claims. Give estimated value of each.	NONE	0.00
21. Patents, copyrights, and other intellectual	NONE	0.00

property. Give estimated value of each.			
22. Licenses, franchises, and other general intangibles. Give particulars.	NONE		0.00
23. Automobiles, trucks, trailers, and other vehicles and accessories.	1969 Camaro (son has possession of it)	W	1,738.02
	1991 Camaro	W	9,144.00
	mobile home	W	11,000.00
24. Boats, motors, and accessories.	NONE		0.00
25. Aircraft and accessories.	NONE		0.00
26. Office equipment, furnishings, and supplies.	NONE		0.00
27. Machinery, fixtures, equipment, and supplies.	NONE		0.00

28. Inventory.	NONE		0.00
29. Animals.	NONE		0.00
30. Crops-growing or harvested. Give particulars.	NONE		0.00
31. Farming equipment and implements.	NONE		0.00
32. Farm supplies, chemicals, and feed.	NONE		0.00
33. Other personal property of any kind not already listed. Itemize.	Ellen vs. Bruno's (worker's compensation)	W	unknown
	Ellen vs. Heilig Meyers	W	unknown
	Ellen vs. Voyager Insurance Company, et al.	W	unknown
		Total	28,300.94

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

KATHY ANN ELLEN; JACKIE E. WHITSON, et al.,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 94-AR-2679-E
VOYAGER GUARANTY INSURANCE COMPANY; et al.,	)	
Defendants.	)	

DEFENDANT ALBERT B. SPROUSE, JR.'S
ARGUMENT IN SUPPORT OF DEFENDANT
VOYAGERS' MOTION TO RECONSIDER

Come now the Defendant, Albert B. Sprouse, Jr. ("Sprouse"), by and through the undersigned as his counsel of record, who hereby joins in the motion and request made by Defendant, Voyager Guaranty Insurance Company ("Voyager"), for this court to reconsider its Order of Abstention and Remand, and submits the following as additional argument in support thereof:

I. PRELIMINARY STATEMENT

Sprouse recognizes the very meritorious arguments of Voyager made in support of its pending motion, and sees no need for duplicity in restating the reasons why this court should reconsider its earlier order and deny remand of this case to the Circuit Court of Marengo County. However, due to the fact that Sprouse is the fraudulently joined Defendant for the sole purpose of

defeating diversity jurisdiction in that he is a defendant in a prior pending action by the Plaintiff, Jackie Whitson, for the same cause of action, Sprouse feels compelled to more specifically address for this court's benefit why the two pending cases of which he is a party constitute the same cause of action. It is unquestionably without dispute that Plaintiff, Jackie Whitson, and Defendant Sprouse are the same parties, and that there are pending two separate lawsuits in different courts, the first of which was filed in the Circuit Court of Talladega County. Therefore, two of the three requirements of the prior pending action statute[1] are met.

Though it is readily apparent from a review of the pleadings that the two suits involve the same causes of action (the wording is virtually identical), Sprouse understands from statements made by Plaintiffs' counsel in three separate courts, including this one, Plaintiffs contend there may be differences in the causes with respect to the conspiracy theories alleged in each of the two suits. However, the law in Alabama does not support such a twisted contention by the Plaintiffs. Since the two suits are predicated upon the same facts and arose from the same transactions and occurrences, being those finance transactions by customers of Farmers Furniture in acquiring furniture, jewelry, and electronics which may have also involved the purchase of certain insurance coverages underwritten during these transactions, they thus arise from the same core of operative facts.

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[1]§ 6-5-440 of the *Code of Alabama*, 1975 provides:

"No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case, the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times. (Code 1907, § 2451; Code 1923, § 5657; Code 1940, T. 7, § 146.)

II. THE FACTUAL CIRCUMSTANCES INVOLVED IN BOTH SUITS UNDERPIN "THE SAME CAUSE".

The law in Alabama is clear that a plaintiff cannot maintain two separate lawsuits claiming different damages because all of the claims arise out of the same wrongful acts or occurrences. *Price v. Southern Railway Company*, 470 So.2d 1125 (Ala. 1985); *Sessions v. Jack Cole Co.*, 276 Ala. 10, 158 So.2d 652 (1963). The Plaintiffs may argue that different causes of action exist in the two suits because of the different theories of recovery for conspiracy, one conspiracy being between Farmers Furniture and Sprouse in the sale of non-filing insurance and other insurance products, and the other form of conspiracy being between Voyager and its licensed agent Sprouse in the sale of said insurance products and coverages in the finance transactions with Farmers Furniture. However, it is a fundamental principle that a "cause of action" grows out of the wrongful act and not the various forms of damages and theories of recovery that may flow from the wrongful act. *Birmingham Southern Railway Company v. Litner*, 141 Ala. 420, 38 So. 363 (1904); *Chappel v. Boykin*, 41 Ala.App. 137, 127 So.2d 636, cert. denied 271 Ala. 697, 127 So.2d 641; *Terrell v. City of Bessemer*, 406 So.2d 377 (1981).

It has been recognized that although a plaintiff may attempt to institute actions on different theories of recovery, these theories are not different "causes of action," in the context of the rule against splitting a cause of action. "A cause of action may give rise to one or more theories of recovery." *Terrell, supra.* P. 339. Plaintiffs cannot attempt in this case to differentiate the two cases as separate causes of action on the basis of there being two different theories of conspiracy, when the factual circumstances relating to each conspiracy theory are identical. The effect of the Talladega County cause of action as a matter of abatement cannot be avoided by asserting and

raising a new theory as to another defendant (Voyager) in this cause, along with the other claims already pending between Plaintiff, Whitson and Sprouse in Talladega. *Ex parte Dunlap*, 209 Ala. 453, 96 So.2d 441 (1923).[2]

The Plaintiffs in this cause made purchases of certain items which were financed by Farmers Furniture and were subject to non-filing insurance and other insurance coverages provided by Voyager. All of the transactions were handled by representatives of Farmers Furniture, including Sprouse its store manager in Talladega, which transactions may have included the sale of various insurance products underwritten by Voyager *at the time of the financed purchases* of furniture, jewelry, or electronics. No Plaintiff had a separate transaction with Voyager. All of the factual circumstances and occurrence are identical for both contended separate conspiracy theories, and as a result, they are the same cause of action.

CONCLUSION

This court should grant Defendant, Voyager's motion for reconsideration, so as to once again confer jurisdic-

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[2]The Supreme Court of Alabama has stated:

"... the two suits were brought to enforce the same cause of action and the parties to the alleged equity of the two bills were the same. True, as to some collateral questions, viz. whether defendant had attempted to dispose of property in fraud of complainant's right and whether an injunction might be appropriately used to preserve defendant's estate pending a decree, the bills differed; but the paramount question was the same in each case. and complainant in each bill stated the same cause of action, viz. defendant's abandonment of complainant on August 22, 1920. The effect of the pendency of the former suit as a matter of abatement was not avoided by raising new questions as to new parties in the second suit along with the old question between the parties to both suits. *Memphis v. Dean*, 8 Wall. 64, 19 L. Ed. 326."

Ex parte Dunlap, supra, p. 443

tion on this court of this cause since no viable cause of action against the only non-diverse defendant, Sprouse, can exist by virtue of § 6-5-440 of the *Code*. Sprouse has thus been fraudulently joined, and Voyager's motion is due to be granted.

Respectfully submitted,

/s/ William S. Pritchard III
WILLIAM S. PRITCHARD, III
Alabama Bar No. 423-60-4346

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/s/ B. Clark Carpenter, Jr.
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CERTIFICATE OF SERVICE

I certify that I have served a copy of the above and foregoing on all attorneys of record by placing a copy of same in the United States mail, properly addressed, and first class postage prepaid this 23rd day of January, 1995.

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/s/William S. Pritchard, III
Of Counsel

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA, NORTHERN DIVISION

KATHY ANN ELLEN; JACKIE E. WHITSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
VS.	)	CASE NUMBER NO. 94-0525-BH-C
VOYAGER PROPERTY AND CASUALTY INSURANCE COMPANY, et al.,	)	
Defendants.	)	

PLAINTIFFS' MOTION TO REMAND

Come now the plaintiffs and respectfully request this Court to remand the above-styled cause to the Circuit Court for Marengo County, Alabama, and as grounds therefore state as follows:

1. The defendants' removal on the basis of diversity jurisdiction is improper because the claims of each and every member of the class fail to satisfy the requisite jurisdictional amount for suits in federal court pursuant to 28 U.S.C. Section 1332.

2. The defendants' removal on the basis of diversity jurisdiction is improper because both Katherine Ellen and Jackie Whitson, residents of Alabama, have proper claims against Albert Benjamin Sprouse, a defendant who is also a resident of the State of Alabama.

3. Jackie Whitson's claim should not be abated in this action because the issues and the parties in this claim are not identical to the issues and parties in the claim filed in Talladega County.

4. Kathy Ellen's claim should be remanded pursuant to 28 U.S.C. § 1334(c)(2).

/s/ Lloyd W. Gathings, II
Lloyd W. Gathings, II
Attorney for Plaintiffs
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of July, 1994, served a copy of the foregoing pleading by placing a copy of same in the U. S. Mail, properly addressed and postage prepaid, on the following parties:

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Of Counsel

APPENDIX O

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

KATHY ANN ELLEN and	)	
JACKIE WHITSON, et al.,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CIVIL ACTION NO.
	)	94-0525-BH-C
VOYAGER INSURANCE CO.,	)	
et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' SUPPLEMENTAL BRIEF

The Court previously requested the parties to address eight issues set forth by the Court at oral argument on September 28, 1994, and granted the parties permission to address other issues as they deemed appropriate. At the hearing leave was granted to file supplemental briefs. Plaintiffs respectfully submit the following brief on the issues raised by the Court as well as on the issue of jurisdictional amount.

Prior to addressing the issues set forth by the Court, Plaintiffs would like to call the Court's attention to the issue of whether the jurisdictional amount is present to afford this Court subject matter jurisdiction. The issue depends upon whether the claims of the class members can be aggregated to reach the jurisdictional amount.

Judge Pittman had the opportunity to address the aggregation issue in a class action in *Bassett v. Toyota Motor Credit Corp.*, 818 F. Supp. 1462 (S.D. Ala. 1993).[1] Plaintiff claimed that the defendants force-placed insurance coverage and sought recovery for breach of contract, breach of fiduciary duty, fraud by suppression, and civil conspiracy. *Id.* at 1463-64. The motion to remand was based upon the amount in controversy not exceeding the jurisdictional amount. *Id.* at 1464. The Court noted that the threshold issue was "whether aggregation of punitive damage claims among class members is appropriate to reach the jurisdictional amount in controversy." *Id.* Relying upon *Lindsey v. Alabama Telephone Co.*, 576 F.2d 593 (5th Cir. 1978) and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973) in remanding the case, the Court reasoned as follows:

> "The law in this Circuit as to aggregation of the claims of class members to achieve the jurisdictional limit, is set forth in Lindsey v. Alabama Telephone Co., 576 F.2d 593 (5th Cir. 1978). [Footnote omitted] . . . In holding that the federal district court was without subject matter jurisdiction over plaintiff's claims, the Fifth Circuit Court of Appeals set forth the following precedent as to class action suits where jurisdiction is at issue:
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> > 'One of the jurisdictional requirements in any civil action in which the district court's original jurisdiction is invoked under the diversity statute is that 'the matter in controversy exceeds the sum or value of $10,000.00, [now $50,000.00] exclusive of interest and costs. 28 U.S.C. § 1332. Of course, the claims

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[1]All cases cited in this memorandum are attached hereto as Addendum 3.

> of several plaintiffs, suing as members of a class, cannot be aggregated for the purpose of satisfying this jurisdictional predicate. See Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969). Moreover, as the Supreme Court held in Zahn v. International Paper Co., 414 U.S. 291, 94 S. Ct. 505, 38 L. Ed. 2d 511 (1973):
>
> 'The rule plainly mandates not only that there may be no aggregation [of claims] and that the entire case must be dismissed where none of the plaintiffs claim more than $10,000.00 but also requires that any plaintiff without the jurisdictional amount must be dismissed from the case, even though others allege jurisdictionally sufficient claims. 414 U.S. at 300, 94 S. Ct. at 511.'
>
> 576 F.2d at 594."

Id. at 1465-66. As in the present case, the defendants in *Bassett* asked the Court to ignore the holding in *Lindsey.* This argument was also rejected by the Court:

> "In the case sub judice, to find for the Defendants on the issue of aggregation, this Court would necessarily have to ignore the holding in Lindsey. Surprisingly, that is exactly what the Defendants have asked this Court to do. In addition to encouraging this Court to disregard Lindsey, the Defendants to propose that the punitive damage claims of the class members be attributed to the class as a whole and treated as a 'common fund.' In support of this argument, Defendants rely in part on In re Northern District California 'Dalkon Shield' IUD Products Liability Litigation, 526 F. Supp. 887, 911 (N.D. Cal. 1981). However, even if the 'common fund' theory was supported by Dalkon Shield,

that theory has been subsequently indirectly overruled by the Ninth Circuit Court of Appeals in Goldberg v. CPC International, Inc., 678 F.2d 1365, (9th Cir. 1982) . . .

". . . [T]he Defendant's understanding of the test for common and divided interest appears to be misdirected. An interest is 'common and undivided' where only the class as a whole is entitled to the relief requested. See Griffith v. Sealite Corp., 903 F.2d 495, 498 (7th Cir. 1990). Where class members are attempting to obtain individual payments from the defendants, or are attempting to gain relief to which any single one of them would be entitled, the rights of the class are 'separate.' See National Organization for Women v. Mutual of Omaha Insurance Co., 612 F.Supp. 100 (D.D.C. 1985).

". . . In the case sub judice, each class member has a separate insurance contract and could in theory bring an individual action for the Defendant's alleged improper conduct with regard to those contracts. Thus, this class cannot be said to possess a 'common and undivided interest' and are in fact stating separate and distinct claims, the value of which must be analyzed in order to determine whether the jurisdictional amount has been met or exceeded.

"Having determined that the claims of the individual class members in this lawsuit are separate and distinct, the dictates of Snyder v. Harris, and Zahn v. International Paper Co., clearly direct that separate and distinct claims of class members cannot be aggregated in order to satisfy the amount in controversy, Snyder, 394 U.S. at 336, 89 S. Ct. at 1056, and require that each plaintiff's claim in a class action must satisfy the

> jurisdictional amount. Zahn, 414 U.S. at 301, 94 S. Ct. at 511."

Id. at 1467. As pointed out in *Bassett*, the 5th Circuit's opinion in *Lindsey*, and the United States Supreme Court decisions in *Snyder* and *Zahn* are still the controlling law. All these cases state that the claims of class members cannot be aggregated to achieve the jurisdictional amount.

Defendants attempt to avoid the result called for by these cases by contending that 28 U.S.C. § 1367 allows the aggregation of claims to reach the jurisdictional amount. However, examination of the cases cited by Defendants for this proposition reveals that their argument does not apply unless all of the plaintiffs were injured in the *same incident.*

In *Patterson* v.*Bridgestone/Firestone, Inc.*, 812 F.Supp. 1152 (D. Kan. 1993), Plaintiffs claims were based upon a single motor vehicle accident involving an alleged defective Firestone tire. The plaintiff trucking company claimed damages of $19,833.90 for damages to the contents of the truck, and the plaintiff Patterson claimed damages to his tractor in the amount of $50,685.34. Plaintiff Enterprises claimed damages of $30,200 for damages to the contents of the trailer. Firestone sought to have the claims of the trucking company and Enterprise dismissed for failure of those claims to exceed the $50,000.00 jurisdictional amount. The Court rejected this argument on grounds which have no application to the present case:

> "This court has supplemental jurisdiction over Enterprises' and Trucking's claims under the plain meaning of 28 U.S.C. § 1367 *because all the claims relate to the same incident.* Their claims 'are so related to claims in the action within such original jurisdiction [i.e. Mr. Patterson's claims] that they form part of the same case or

> controversy under Article III of the United States Constitution./28 U.S.C. § 1367(a)."

Id. at 1154. The Court made it clear in a footnote that class actions where the claims do not relate to the same incident are still controlled by *Zahn*:

> "FN1. The defendant also has cited Bradbury v. Robertson-Ceco Corp., No. 92-C-3408, 1992 WL 178648 (N.D. Ill. July 22, 1992), for the proposition that 28 U.S.C. § 1367 does not effectively overrule Zahn when the court only has jurisdiction over a claim or claims based on diversity. However, Bradbury applies to the aggregation of claims in a federal class action suit based on diversity, which was the specific fact situation present in Zahn, and as such is not applicable in this non-class action."

Id. at 1155.

In *Watson v. Shell Oil Company*, 979 F.2d 1014 (5th Cir. 1992), also cited by Defendants, the "same incident" test set forth above followed aggregation of damages to reach the amount in controversy. All claims of all plaintiffs in that case arose out of an explosion at Shell's manufacturing facility in Norco, Louisiana, on May 5, 1988. *Id.* at 1016. That case does not state that *Zahn* is not still the controlling law under the facts of this case where each class member entered into a separate transaction on different dates.

Garza v. National American Insurance Co., 807 F.Supp. 1256 (M.D. La. 1992), cited by the defendants, also met the "same incident" test. All claims of the plaintiffs in that case arose out of a single automobile accident. *Id* at 1257-58. The Court's ruling which allowed the claims to be aggregated for jurisdictional amount purposes was based on the fact that there was a single automobile accident from which the claims arose. *Id.*

Defendants' attempt to argue that the claims of the individual class members each exceed $50,000.00 is ludicrous. First, the compensatory damages for each class member concerning the non-filing insurance claims would be $3.50 to $15.00, plus interest charged to finance these premiums. When the charges for the other insurance coverages are considered, the compensatory claims for each plaintiff will still be well under $1,000.00 each. No claim has been made for mental anguish. Even if such a claim had been made, it can hardly be argued that each plaintiff would have another $49,000 plus in compensatory damages for such a claim.

No discovery has been conducted in this case and therefore it is not known how many plaintiffs are in the proposed class. However, the class in *Whitson v. Heilig-Meyers Furniture Company*, in the United States District Court for the Northern District of Alabama, Southern Division, CV 94-Pt-0309-E, numbered 142,000 people, all of whom would be included in the class in this case since they all were charged for Voyager "insurance" in their transactions with Heilig-Meyers.[2] In addition, the proposed class in *Whitson v. Warehouse Home Furnishings Distributors, Inc.*, in the Circuit Court for Talladega County, Alabama, CV-94-177, has in excess of 13,000 members, almost all of whom had Voyager credit "insurance" policies.[3] Without regard to the numerous other persons in Alabama who have bought credit "insurance" policies of

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[2]This number was disclosed in oral argument at the class settlement fairness hearing held before Judge Propst in the Heilig-Meyers case.

[3]Plaintiff Exhibit 47 to the deposition of John Derrell McGinnis, taken in *Whitson v. Warehouse Home Furnishings Distributors, Inc., supra.* All exhibits to the McGinnis deposition referred to in this brief are attached as Addendum 1 to this memorandum and are tabbed with the same exhibit number they had in the deposition. The deposition of Mr. McGinnis is attached hereto as Addendum 2.

Voyager written through retailers, the numbers from just these two cases are 155,000 class members who have bought Voyager credit insurance. In order for each to have a claim in excess of $50,000.00, the total recovery would have to be in excess of $7,750,000,000,.00 or 7.75 billion dollars. This is unprecedented in Alabama. This amount could not be paid by the defendants. The case law with regard to post-judgment review of punitive damages would not allow a verdict in this amount to stand. It cannot be argued with any validity whatsoever that each member of the class has a claim in excess of $50,000.00.

Based upon this issue alone, Plaintiffs respectfully submit that this case is due to be remanded to the Circuit Court for Marengo County, Alabama. The fact that there is incomplete diversity of citizenship and that the bankruptcy laws do not confer jurisdiction on this Court buttress the conclusion that this case should be remanded.

The remainder of this brief will be used to set forth in writing the arguments, authorities and exhibits Plaintiffs utilized at the hearing on September 28, 1994, on those issues raised by the Court.

1. Plaintiffs' basis for contending that personal jurisdiction exists as to defendants Voyager Life & Health Insurance Company, Voyager Property & Casualty Insurance Company and Voyager Group, Inc.

Voyager Life & Health Insurance Company

As admitted in the Affidavit of G. Gano Harris, Jr., which was attached to the defendants' motion to dismiss for lack of personal jurisdiction, Voyager Life and Health is registered to do business in the State of Alabama. That company has filed and stayed current with the Alabama Department of Insurance at least through 1993. As shown by Plaintiff's Exhibit 13 to the deposition of John

Darrell McGinnis, taken in *Whitson v. Warehouse Home Furnishings Distributors, Inc., supra,* and the testimony on page 109 of that deposition, Voyager Life and Health was the life and the accident and health carrier for the credit insurance policies sold through Warehouse Home's stores (Farmers Furniture) in Alabama.

Voyager Property & Casualty Insurance Company

As shown by Plaintiff's Exhibit 13 to the deposition of John Darrell McGinnis, taken in *Whitson v. Warehouse Home Furnishings Distributors, Inc., supra,* and the testimony on page 122 of that deposition, the property and unemployment insurance sold by Warehouse Home in connection with credit transactions with customers in Alabama was that of *Voyager Property & Casualty Insurance Company.*

Voyager Group, Inc.

As shown by Plaintiff's Exhibit 33 to the deposition of John Darrell McGinnis, taken in *Whitson v. Warehouse Home Furnishings Distributors, Inc., supra,* all property insurance claims for Warehouse Home's Alabama customers were handled by Voyager Group, Inc.

In addition to the above, which alone is sufficient to deny Defendants' motion, it should be noted that all of the Voyager companies did business as the "Voyager Insurance Companies," including those companies set forth above. This is shown by Plaintiff Exhibits 10 and 13 to the deposition of John Darrell McGinnis, *supra.* The fact that the Voyager Insurance Companies did business in Alabama with Warehouse Home (Farmers Furniture)

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[1]Additional contracts and deposition exhibits from other cases showing that these companies were in fact doing business in Alabama are attached hereto as Addendum 4.

is shown by Plaintiff Exhibits 6, 10-19, 21, 24-28, 33-34, and 51-52 to that deposition.[1]

Based upon the foregoing, it is respectfully submitted that there is abundant evidence that Voyager Life & Health Insurance Company, Voyager Property & Casualty Insurance Company, and Voyager Group, Inc. were all subject to the personal jurisdiction of the Alabama courts and also this Court.

2. A reason this Court ought not to deny the motion filed by Voyager Guaranty Insurance Company and Voyager Life Insurance Company, to the extent it seeks dismissal of the complaint, on the grounds that these defendants have failed to file a brief in support of the motion in compliance with Local Rule 6 of this Court.

This issue is addressed solely to the defendants and is not appropriate for argument by the plaintiffs.

3. Plaintiffs' basis for contending that the claims asserted against Sprouse in this action are not identical to those asserted against Sprouse in Whitson v. Farmer's Furniture of Alabama, Inc., Civil Action No. C-9-177 (Cir. Ct. Talladega Co.) inasmuch as the latter action clearly alleges misrepresentation and suppression with respect to the purchase of "non-filing insurance for the purposes of perfecting a security interest in the furniture and jewelry [purchases by the plaintiff]."

It should be noted at the outset that Kathy Ellen has not previous to the filing of this case asserted any claims against Sprouse. As of this date, the class has not been certified in the Farmer's Furniture case, so it cannot be contended that Ellen has asserted any claims as a member of the class in that case. The basis of her claims

against Sprouse in this case is discussed under a later issue herein.

With regard to Jackie Whitson's claims against Sprouse, all matters raised in the complaint in the present case were raised in the Talladega County complaint, except the co-conspirators with Sprouse are different in the two complaints. This is consistent with the idea that retailers involved in these matters are different from the insurers. Sprouse was not only an employee of Farmers Furniture, he was also a licensed agent for Voyager. As such it was possible, and in fact was the case, that he participated in a conspiracy with Farmers Furniture and also in a conspiracy with Voyager. These two conspiracies would be separate events for which he would be separately liable. The elements required to prove a conspiracy in Alabama are discussed under a later issue herein.

4. Plaintiff Ellen's basis for asserting a claim against Sprouse if Whitson's claims against Sprouse abated under Alabama law.

Plaintiff Ellen's claims against Sprouse are based solely on conspiracy. In Alabama conspiracy is described as "a combination of two or more persons to accomplish an unlawful end (by civil law standards) or to accomplish a lawful end by unlawful means." *Eidson v. Olin Corp.*, 527 So.2d 1283, 1285 (Ala. 1988).

> "'A great quantum of detail need not be required to be alleged as to the formation of the conspiracy because of the clandestine nature of the scheme or undertaking engaged in. The existence of the conspiracy must often be inferentially and circumstantially derived from the character of the acts done, the relation of the

> parties, and other facts and circumstances suggestive of concerted action.'"

Id., quoting, O'Dell v. State ex rel. Patterson, 270 Ala. 236, 240, 117 So. 2d 164, 168 (1959).

Defendants only real argument that Ellen cannot have a claim against Sprouse is based on Plaintiff Ellen not having any transactions with Sprouse. However, it is well-settled law in Alabama that such contact is not necessary for Plaintiff Ellen to recover against Sprouse on a conspiracy claim. The same argument was made by the defendants in *Huckleberry v. M.C. Dixon Lumber Co.*, 503 So.2d 1209 (Ala. 1987) and was rejected by the Alabama Supreme Court:

> "Counsel's contention in support of summary judgment centers primarily on the undisputed evidence that their respective clients had little or no direct contact with the plaintiffs throughout the entire transaction that culminated in the plaintiffs' loss of title to the subject property. This contention emphasizes the fact that defendant Shadrick alone dealt with the plaintiffs, so that whatever promises and representations were made to them were made by Shadrick, against whom the fraud claim is still pending. While this argument is persuasive, it is a factual, not a legal, defense.
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> "It is not an essential element of the claim that a particular conspirator commit an overt act in furtherance of the conspiracy. As stated in *Stokley v. State*, 254 Ala. 534, 542, 49 So. 2d 284 (1950):
>
> > 'This rests on the principle that one who is present, encouraging, aiding, abetting, or assisting, or who is ready to aid, abet, or assist the other in the perpetration or commission of the offense, is a guilty participant, and in

> the eye of the law is equally guilty with the one who does the act. Such community of purpose or conspiracy need not be proved by positive testimony. It rarely is so proved. The jury is to determine whether it exists, and the extent of it, from the conduct of the parties and all the testimony in the case. *Morris v. State*, 146 Ala. 66, 41 So. 274 [(1906)], and cases cited; *Jones v. State*, 174 Ala. 53, 57 So. 31 [(1911)]; *Teague v. State*, 245 Ala. 339, 16 So. 2d 877 [(1944)].'
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> "This principle of criminal conspiracy was again echoed in the civil action of *Barber v. Stephenson*, 260 Ala. 151, 156, 69 So. 2d 251 (1953):
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> > 'Concededly there was no positive evidence to that effect, but a conspiracy need not alone be established by that character of evidence. Indeed, seldom is such the case. It is only by looking to the conduct of the alleged conspirators during the progress of the conspiracy and the end result achieved that usually such a fact is established. And to that end it is proper to consider evidence extending over a considerable period, both before and after the date of the alleged combination and even after its termination, just so the proof has a tendency to establish the ultimate fact. *Scheele v. Union Loan & Finance Co.*, 200 Minn. 554, 274 N.W. 673; *Blakeney v. State*, 31 Ala. App. 154, 13 So. 2d 424; certiori denied, 244 Ala. 262, 13 So. 2d 430; 15 C.J.S. Conspiracy § 92, p. 1143.'

503 So. 2d at 1211. Based upon the foregoing, the argument of defendants that Ellen cannot have a claim against Sprouse because she did not enter into a transac-

tion at the Farmers Furniture store where Sprouse was credit manager is without validity.

At the appropriate time after reasonable discovery has been conducted in this case, Plaintiffs will set forth in detail all of the evidence supporting this conspiracy. It will be clear that Sprouse, as an agent for Voyager, was "present, aiding, abetting, or assisting" in the conspiracy with Voyager which resulted in the injury to the named plaintiffs, including Plaintiff Ellen, and the members of the class.

5. Plaintiffs' basis for contending that venue lies within either Marengo County, Alabama, or the Southern District of Alabama.

Ala Code § 6-3-7 provides the following with regard to venue of foreign corporations:

> "*A foreign corporation may be sued in any county in which it does business by agent,* and a domestic corporation may be sued in any county in which it does business by agent or was doing business by agent at the time the cause of action arose; provided, that all actions against a domestic corporation for personal injuries must be commenced in the county where the injury occurred or in the county where the plaintiff resides if such corporation does business by agent in the county of the plaintiff's residence." (Emphasis added.)

Voyager Guaranty Insurance Company was doing business by agent in Marengo County in 1994. This is evidenced by the records of the Alabama Department of Insurance, previously submitted to the Court, showing that Joe Cooper Wallace, Linden, Alabama, was a licensed agent in 1994 for credit property insurance.

The venue being correct as to Voyager Guaranty Insurance Company, the venue is proper as to the other defendants pursuant to Rule 82(c) ARCP, which provides:

> "(c) Venue Where Claim or Parties Joined. Where several claims or parties have been joined, the suit may be brought in any county in which any one of the claims could properly have been brought. Whenever an action has been commenced in a proper county, additional claims and parties may be joined, pursuant to Rules 13, 14, 22 and 24, as ancillary thereto, without regard to whether that county would be a proper venue for an independent action on such claims or against such parties."

Thus, pursuant to Ala. Code § 6-3-7 and Rule 82(c) ARCP, venue is properly laid in Marengo County or the Southern District for all defendants.

6. Plaintiffs' basis for contending that either Talladega County, Alabama, or the Northern District of Alabama is not the situs of the purchases of consumer goods and the misrepresentations at issue in this litigation and thus more convenient for the parties and witnesses in this action.

As is obvious from the list of Voyager's registered agents in Alabama which Plaintiffs have already submitted to the Court, Voyager sold credit insurance in connection with retail sales of consumer products in almost every county in the State of Alabama.[5] The exact same forms were used in all of these transactions with regard to the issues in this case and the exact same "insurance" coverages were written. Thus the purchases and misrep-

[5]See Exhibit 6 previously submitted to the Court.

resentations were made in almost every county in the state, including Marengo County. The only witnesses in the case, outside of the class members and Voyagers' agents, who are located throughout the state, will be out-of-state witnesses, primarily from Georgia, Florida, and Texas where various Voyager offices were located. Thus, from the standpoint of where the tortious acts occurred and where the witnesses reside, Marengo County is as convenient as any other venue in the State of Alabama.

7. Plaintiffs' reply to Sprouse's arguments concerning jurisdiction under 28 U.S.C. § 1334(b) by virtue of Ellen's Chapter 13 bankruptcy petition.

28 U.S.C. § 1334(b), which is relied on by the defendants, states that:

> "(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11."

The defendants' argument, however, ignores the next two subsections of § 1334:

> "(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
>
> (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title

> 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, *the district court shall abstain* from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. . . ."

28 U.S.C. § 1334(c)(1), (2) (Emphasis added.) The cases which have considered these subsections under circumstances more closely related to the bankruptcy procedures than are the defendants in this case have held that the district court should not hear the case.

In *Sweeney v. Citicorp Person-To-Person*, 49 B.R. 1008 (N.D. Ill. 1985), the plaintiff filed a Chapter 13 bankruptcy petition in 1980 and filed a second petition in 1983 which was pending at the time he filed a class action lawsuit against defendants who were creditors in the bankruptcy action. *Id.* at 1008-09. The class action alleged that defendants had violated the Illinois usury statutes by virtue of contracting for interest payments in excess of the statutory minimum. *Id.* at 1009. As is the case here, no basis for federal jurisdiction appeared in the class action other than the relatedness of the claims to bankruptcy proceedings. The court held that this was not sufficient to maintain the class action in federal court. *Id.* at 1011. The court's reasoning is equally applicable to the present case:

> "The Court requested the parties to consider the effect of State Bank of Lombard, supra, to this case. In that case, plaintiff and defendant were creditors of a Chapter 11 debtor. Plaintiff filed its complaint in state court, alleging that defendant had breached an agreement to subordinate one of its loans to the loan made by plaintiff. The state court case was removed to

this Court on defendant's petition. Plaintiff then moved to remand. This Court granted plaintiff's motion to remand, holding that under § 1334(c)(2):

> a district court must abstain from hearing a purely state law claim where there is no other basis for federal jurisdiction other than its relatedness to a bankruptcy proceeding (including where the debtor is a party) and where the claim can be timely adjudicated in state court.

State Bank of Lombard, supra, 46 B.R. at 472.

"This case involves discretionary abstention under § 1334 (c)(1), instead of mandatory abstention under § 1334 (c)(2), because plaintiff's Chapter 13 bankruptcy proceeding was filed before the effective date of the amended § 1334 (c).... However, the Court believes that the same reasoning should be applied in a case of discretionary abstention under § 1334 (c)(1) as is applied in mandatory abstention cases under § 1334 ()(2). . . .

"As the Court noted above, abstaining from this action would not tread on the state court's toes. In addition, failure to abstain would put this Court in the position of deciding a novel question of law under Illinois' usury statute. Such a decision could impinge on the respect for state law enunciated in § 1334 (c)(1).

" . . .This type of case is distinguished from cases involving recovery of a preference, setting aside a fraudulent conveyance, objection to a discharge or modification of an automatic stay. . . .

"Therefore, this Court holds that, under § 1334 (c)(1), abstention is proper where, as

here, the only basis for federal jurisdiction is that a judgment in a purely state law case might become a claim or a defense to a claim in a bankruptcy proceeding. In so holding, the Court finds the reasoning in In re Dakota Grain Systems, Inc., 41 B.R. 749 (Bankr.D.N.D. 1984) to be persuasive:

> With the Supreme Court's rather clear pronouncement with respect to the exercise of jurisdiction over matters based principally upon state law and in view of the recent remedial legislation it would be inappropriate for this Court to ignore the clear expression of both the United States Supreme Court and Congress by entertaining jurisdiction solely because section 1334(c)(2) is not applicable."

Id. at 1010-11. Although pointed out in the quote above, Plaintiffs again note that although *Sweeney* was decided under 1334 (c)(1) because the bankruptcy occurred before 1334 (c)(2) was passed, the Court applied the 1334 (c)(2) standard in abstaining.

The same result was reached in *In re American Energy, Inc.*, 50 B.R. 175 (D.N.D. 1985). In that case the trustee of a debtor with a pending bankruptcy proceeding sued 12 defendants for alleged breach of contracts with the debtor. The Court held that the contract actions were not core proceedings, which is a term "meant to encompass those proceedings which would not exist at law in absence of the Bankruptcy Code." *Id.* at 178. Since they were not core proceedings and did not arise under Title 11, the Court held that the contract actions were related proceedings, defined as: "'Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or state court . . . '" *Id.* at 179-80, *quoting, Matter of Colorado Energy Supply, Inc.*, 728 F.2d 1283 (10th Cir. 1984).

"Such cases, although tangentially related to a pending bankruptcy proceeding, are not sufficiently related to the proceeding to confer jurisdiction on the bankruptcy court under 28 U.S.C. § 157(c)(1) unless there also exists an independent basis for federal jurisdiction." *Id.* at 180. In addition, the Court noted the "[i]f a jury trial has been requested but the case, although 'related,' is based on state law with no independent basis for federal jurisdiction, then the bankruptcy court ought to abstain." *Id.* at 181. *See also Maryland National Industrial Finance Corp. v. Gold Dust Coal Company*, 49 B.R. 288 (N.D. Ill. 1985; *Brateman v. Brateman Bros., Inc.*, 135 B.R. 853 (N.D. Ind. 1991).

Pursuant to these decisions, federal court should abstain from these cases, including the case of Kathy Ellen. Abstention is even clearer here than in *Sweeney* since the defendants here were not creditors in the bankruptcy action of Ellen.

Although jurisdiction should not be retained in the Ellen case based on 28 U.S.C. § 1334, it should be noted that there is authority suggesting that if removal on the basis of bankruptcy is proper, the entire case is not due to be removed:

> "Professor Gibson argues that bankruptcy removal does not involve the transfer of an entire law suit. Instead it operates only to transfer those portions of a law suit involving the debtor over which the bankruptcy court would otherwise have jurisdiction; leaving any collateral disputes which might also be raised in the litigation, whose resolution would have absolutely no impact on the administration, liquidation, or distribution of the bankruptcy estate, in the state court where the action originated."

Brateman v. Brateman Bros., Inc., 135 B.R. 853, 854-55 (N.D. Ind. 1991). Thus Plaintiffs would submit that if the

Court determined that there was jurisdiction of Ellen's claims based upon § 1334, the Whitson and class claims should still be remanded to state court.

8. Sprouse's basis for contending that: (1) one who is neither a creditor nor the debtor has standing to assert jurisdiction under 28 U.S.C. § 1334(b); (2) a Trustee's control of assets in a Chapter 7 or Chapter 11 case is similar to that in a Chapter 13 case; and (3) this court ought not to be guided by *In re Brateman Bros., Inc.*, 135 B.R. 853, 856 (Bankr. N.D. Ind. 1991), a case he himself relied upon, to the extent it clearly holds that "[t]o allow ["a stranger to the litigation involving the bankruptcy estate"] to remove the action will effectively deprive the trustee of his legitimate choice of forum."

This issue is addressed to the defendant Sprouse. Plaintiffs' arguments regarding the bankruptcy matter are contained under the previous issue.

CONCLUSION

Based upon the authorities discussed herein, Plaintiffs submit that this case is due to be remanded to the Circuit Court of Marengo County, Alabama. There is incomplete diversity of citizenship of the parties and the required jurisdictional amount is not in controversy. Further, proceeding with this case in federal court on the basis of 28 U.S.C. § 1334 would not be proper.

Respectfully submitted this 19th day of October 1994.

/s/ Lloyd W. Gathings, II

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon William S. Pritchard, III, Pritchard, McCall & Jones, 800 Financial Center, 505 North 20th Street, Birmingham, AL 35203 and William B. Hairston, Jr., Engel, Hairston & Johanson, P.C., 109 North 20th Street, Birmingham, AL 35203, by hand delivery on this the *19th* day of October, 1994.

/s/ Lloyd W. Gathings, II
OF COUNSEL